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IN THE

SUPREME COURT

OF

WISCONSIN

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IN MEMORIAM.

CHARLES SMITH.

On the 8th day of October, 1918, Mr. John A. Murphy of Superior addressed the court as follows:

May it please the Court:—The committee of the Douglas County Bar Association, appointed to prepare and present a memorial to the supreme court of the late Judge CHARLES SMITH, submit the following:

Memorial of the Douglas County Bar Association.

CHARLES SMITH was born in the town of Hampton, New Hampshire, October 1, 1839, and he was therefore in his seventy-ninth year when he died, July 2, 1918. His father, Robert Smith, was a physician, and the family in all its branches of Puritan origin. His early training was that common to New England homes of the period, and after attending the schools of the neighborhood he completed two years of the classical course of Wesleyan University, Middletown, Connecticut. He came West in 1866, partly in the hope of improving his health, which had been delicate from childhood. He was briefly in Minneapolis, but soon found a permanent abiding place at Prescott in this state, where he studied law with J. S. White and was admitted to the bar of Pierce county in 1869. For a time he was in partnership with Mr. White, later with Wellington Vannatta at River Falls, and he was also at one time in partnership with Frank L. Gilson, later judge of the superior court of Milwaukee, and with Nils P. Haugen, at present chairman of the Wisconsin tax commission. At the Pierce county bar he took high rank as an eloquent advocate and safe counselor. He became endeared to the people of Pierce county, and there was universal regret when, after twenty years of successful practice, he was in 1890 induced to remove to Superior, where he became associated with Frank A. Ross, William D. Dwyer, and Louis Hanitch. Life was running high at Superior at this time; it was the period of great expectations; controversies were manifold, and there was much litigation relating to land titles and in other matters incident to a fast-growing community; and the newcomer joined enthusiastically in the activity prevailing and added strength to the firm he had joined.

In 1893, upon the establishment of the superior court of Douglas county, he was elected judge, and by subsequent elections—and after the first election or two he was always re-elected as a matter of course and without opposition—he remained the judge of this court

to the day of his death, his judicial career thus covering twenty-five years. The records show that during this long period 8,961 cases came before him. This great mass of business he disposed of to the satisfaction of lawyers and litigants and his rulings were characterized with fairness and impartiality; and that he was usually right in his decision is attested by the small number of reversals upon appeal to the supreme court. Upon going on the bench he adopted the policy of extending kindness to jurors and looking after their comfort, and he took pains to let them know that he regarded them as co-workers with him in the administration of justice and of equal rank; and thus it resulted that men of the vicinage came to consider sitting on the jury in this court not as a hardship but as a pleasure and privilege.

In the administration of the criminal law, also, he introduced innovations, and it was sometimes thought that he was too lenient with criminals. He had, however, great sympathy with human frailties and believed that in the majority of cases men fall through weakness rather than wickedness, and he further believed that reformation of the criminal was a predominant element in punishment. It was his custom to have a private interview with every man before going to prison and giving such encouragement as he could. Without doubt this extrajudicial service had good effect, and it must be that many were led by Judge SMITH's kind words to leave the ways of darkness and become in after life upright and law-abiding citizens. The same humanitarian impulses were ever present in performing the difficult duties of judge of the juvenile court of this county and in allotting widows' pensions—duties which fell to him *ex officio* as judge of the superior court.

Judge SMITH was married while still at River Falls to Mary Haw, and their married life was altogether beautiful, although saddened by the long invalidism of Mrs. Smith; and when in 1914 the wife died, a cloud came over the husband's life, only to fade away when he joined her in the grave. They had no children, but this lack was in part made up by their taking into their family a nephew of Mrs. Smith, John W. Haw, and they took great joy in his nurture, education, and development. He has attained man's estate and is now a state agricultural expert of North Dakota, and was present at the obsequies of his foster-father—the chief mourner from the standpoint of family. But we were all of us chief mourners on that solemn occasion. Funeral services were held at Superior on July 5th last, with a fitting tribute delivered by a member of the bar, whose intimacy with the subject of his eulogy dated back to the time when both lived in Pierce county, and on the day following he was buried in the spot he had chosen, by the side of his devoted wife, in the beautiful cemetery at River Falls. And there "in his narrow cell forever laid" he sleeps, in the valley of the old St. Croix,—by

the side of the murmuring Kinnickinnic,—among the people he loved so well,—'neath the shadows of the old church whose vesper bells had for so many years called him to its sanctuary.

"*Where* ARE those bells that pealed to God,
When fair was the world and young—
Ere the tide of life had ebbed so far,
And the sorrows were still unsung?
Where are the olden, golden bells,
That guided the straying feet,
And tolled in the evening afterglow,
Like a benediction sweet?"

In private life Judge SMITH had all the qualities which go to make a man beloved, and he was probably the best beloved man in Douglas county. His tall, gaunt, almost Lincolnesque, form attracted attention everywhere; and mentally he was also individual and had a way of doing and saying things which was unique and distinctive. He took a leading part in all movements for the betterment of the community; and he often wrote for the newspapers in advocacy of his views, and what he wrote people *read*, for he had an unusual linguistic power. He was a great reader both of the masterpieces of the past and of current literature, and he was constantly sharing his delight in reading by lending his books and talking over their contents. He was benevolent in small ways as well as great. He would go a long distance to take to a friend a book which had interested him, and a longer distance to render assistance and give material aid to persons in distress. With his money he was generous and without ostentation. It was once said of him: "He does good deeds as others commit crimes—by stealth." Socially he was the best of companions, always enjoying a good joke or story, and in repartee he could not be excelled. And at the annual banquets of this bar, which have occurred without omission for a quarter of a century on each Washington's birthday—occasions when the stress of court procedure and the cares of life generally are for the nonce forgotten and bench and bar are on the same level,—at these banquets Judge SMITH was always the chief merrymaker and contributed more than any one to the joyousness of the gatherings. Indeed, he was a man of the earth, earthy,—keenly relishing all good things of this life. And he had a firm conviction in the power of man to develop and advance by his own efforts.

The modern business world, with its strife and turbulence and scheming, did not appeal to him. He preferred to look upon, or ponder upon, or joke upon, the artifice and strife of the business world, rather than to let his life into the all-devouring maelstrom which today is grinding out wealth and life in one contemporaneous grist. His long life carried him through the most momentous period of our nation's history. He commenced with Webster, Clay, and

Calhoun and ended with Woodrow Wilson. During his life the world has rocked and reeled with the shock of a dozen awful wars. He witnessed four wars in which our nation took part. During his span the world has made more progress than it did in a thousand years before. In the year of his birth the population of the United States was less than 14,000,000; on the day of his death more than 100,000,000 people. His span runs back to the days of Andrew Jackson and to a vast empire—then a primeval waste, now a domain of beauty and wealth. During his life nineteen Presidents were elected and he voted for fourteen of them. And now we are at the close—the world's last picture of this quaint man is being painted into these court proceedings. Those who loved him well have written fondly of him whose inspiring life was ever pointing us onward and upward.

"I cannot say and I will not say
That he is dead. He is just away;
With a cheery smile and a wave of the hand
He has wandered into an unknown land
And left us dreaming how very fair
It needs must be—since he lingers there.
And you, oh you, who the wildest yearn
For the old-time step and the glad return,
Think of him faring on, as dear
In the love of *there* as the love of *here*.
The touches of his hands have strayed,
As reverently as his lips have prayed,
When the little brown thrush that harshly chirred,
Was as dear to him as the mocking bird.
And he pitied as much as a man in pain,
A writhing honey-bee wet with rain.
Think of him still as the same, I say,
He is not *dead*, he is just away."

Dated September 18, 1918.

W. R. FOLEY,
H. V. GARD,
LYMAN T. POWELL,
H. S. BUTLER,
J. A. MURPHY,
Committee.

After the presentation of the memorial Mr. Thomas E. Lyons of Madison spoke as follows:

May it please the Court:—I rise to take part in these proceedings with some diffidence. I am no longer a practitioner at the bar and the obsequies of a friend are seldom stimulating. But no preference of mine should be allowed to withhold any mark of respect due to the memory of Judge SMITH. I knew him well and intimately for

upwards of twenty-five years, and have reason to believe that during that time I, in some measure, enjoyed his friendship and shared his confidence. Warm admiration for his character alone prompts this brief tribute.

As recited in the memorial just presented to the court, Judge SMITH was born and spent his early years in New Hampshire and received his scholastic training in that state. His childhood was spent in a period of national quiet, but as he grew toward manhood the slavery agitation became acute and continued to grow in fierceness and intensity until it culminated in the Civil War.

He often spoke of the conditions of this early period, but seldom of his antecedents except his father, who seems to have been a man of active mind and strong convictions. Denied the advantages of scholastic training himself, he endeavored to give his children the opportunities of an education and freely availed himself of such facilities as the country afforded at that time. It was the day of the political hustings and the lyceum bureau. Henry Ward Beecher, Wendell Phillips, and Ralph Waldo Emerson were then shining stars in their respective spheres and alternately thrilled, fascinated, or exalted the audiences of many New England towns. Several eminent lawyers and statesmen of the day were born in or connected with his native section of the state. Daniel Webster, the great expounder of the constitution, Jeremiah Mason, a still abler lawyer and later Senator, and Franklin Pierce, then prominent in national life, were all well known and familiar figures in this section. Judge SMITH was fond of relating how his father took him, while yet a mere lad, some thirty miles distant to hear the mighty Daniel in one of his great addresses.

The influence of such environment on a sensitive and ingenuous nature was bound to have its effect. Judge SMITH was early habituated to this form of instruction and derived both profit and enjoyment from it. Indeed, it is not improbable that it constituted an important factor in shaping his future career.

The New Englanders of that day were principally engaged in agriculture on a wasting and inhospitable soil. The opening up of the Middle West, with its more fertile fields and greater opportunities for development, made strong appeal to the ambitious young men of the East, and Judge SMITH, falling a victim to the lure, soon joined the westward-bound procession. He first located in Minneapolis, but after spending a short time in that city moved to Prescott in this state, where he immediately took an active part in the social and business life of the community. Within a short time after his removal to Wisconsin he was elected county superintendent of schools of Pierce county, a position for which he was peculiarly qualified. Few men had a truer instinct for spiritual and educational values.

While serving in this capacity he continued the study of law and soon after was admitted to the bar and entered upon the practice of his profession, first at Prescott, later in 1874 at River Falls. He was profoundly impressed by the character and strength of the bar of the Hudson circuit at that time and was fond of relating their sharp contests and generous rivalries in dealing with the problems of that frontier period. The roster of the Hudson bar of that day contains many familiar names, such as Cushman K. Davis, Gus Wilson, George Clinton, Moses and Newell Clapp, Frank Gilson, John C. Spooner, with H. H. Hayden, W. F. Bailey, and Levi Vilas and T. F. Frawley not many miles distant in Eau Claire.

The new aspirant for professional honors found strong competition in this list. But if tradition is to be credited, Judge SMITH did not suffer by comparison with any of these in the rough and tumble of a jury trial. His later associates of the Superior bar had little opportunity to test his qualities as a trial lawyer, for his practice in that city was brief, but it is easy to credit the traditions of the Pierce and St. Croix communities that he was a formidable advocate in his time. He had all the qualities essential to pre-eminence in that field—a tall, striking figures, a fine, expressive face, a resonant and pleasing voice, keen insight into human motives, shrewd common sense, trenchant and dramatic power of speech, and an intense moral earnestness. Such qualities, combined with a firm grasp of legal principles and a never-failing humor, could not fail to give their possessor high rank as an advocate, and such he held and still holds in the community where he lived and practiced many years.

Lumbering was the principal business in the northwestern part of the state during this early period and constituted the principal subject of litigation, but spirited line-fence disputes and other forms of controversy incident to the settlement of the new country were not lacking. During the decade from 1880 to 1890 the lumbering business declined, boundaries became fixed, and the practice of law began to take on the routine character of probate proceedings and office counsel.

This line of practice was ill-suited to Judge SMITH's tastes and qualifications and he sought a more active field in the then promising city of Superior. It was there I first met him in 1890, on my first venture in practice, fresh from the law school. The characteristics that first attracted my attention were his pleasing personality and uniform kindness to the younger members of the bar. On arriving at Superior he became a member of the law firm of Ross & Dwyer, then prominent practitioners in that city. Mr. Dwyer in particular was a very aggressive trial lawyer and continued to be the active member of the firm in that line. Although Judge SMITH was still in middle life, the years had already begun to tell; the ardor of youth had somewhat cooled, and he seemed reluctant to take active charge

of contested causes. Indeed, throughout his life he evinced an undue modesty and needless lack of confidence in his own powers. He often hesitated to follow his own reasoning processes and seemed uncertain of his own conclusions. He did, however, participate in a few trials and made a few jury addresses which amply justified the reputation he had gained as an advocate in the earlier years of his practice.

Douglas county then constituted part of the Eleventh judicial circuit, comprising some ten counties in the northwestern part of the state. Honorable R. D. Marshall of Chippewa Falls, later a distinguished member of this court, occupied the circuit bench and disposed of the great and rapidly growing volume of business with exceptional ability and dispatch. The remoteness of Superior from Chippewa Falls, where the presiding judge resided, and the rapidly growing volume of business at that place, were seized upon as a reason for a separate court for Douglas county. This agitation led to the creation of the superior court, with a jurisdiction practically commensurate with the circuit. Although a comparative stranger in the county, Judge SMITH was nominated by the bar and elected by the people to preside over this newly-created court, a position which he continued to occupy without interruption until his death.

His predominant qualification for the bench was his deep-rooted sense of justice and his scorn for overreaching and wrong-doing in every form. He had the intuition of a woman for hidden motive and the scent of a hound for concealed fraud. In addition he was a good lawyer, with a profound reverence for the common law and a firm grasp of its fundamental principles. While yielding to the authority of arbitrary statutes and technical rules of practice, he always manifested impatience when these were used to obstruct or delay the course of justice. According to his conception, the primary duty of a court is to administer justice and not to referee syllogistic prize-fights between attorneys. It is doubtful whether any court in the state ever more generally or fully achieved that great end.

Broad human sympathy for the frailties of human nature and a pervasive kindness were part of his religious code. His was a court where mercy seasoned justice. The belief that he was unduly lenient with criminals and too impatient with technical defenses developed opposition to his second election. But the unschooled mass of voters, more discerning than disgruntled litigants and disappointed attorneys, indorsed his administration by decisive vote. The result of this election forever silenced criticism and he was reelected term after term thereafter without opposition.

Judge SMITH always manifested a peculiar fondness for and interest in the young. Fate having denied him children of his own, he expended his paternal affection upon the children of the community.

When authority was granted to organize a juvenile court he eagerly availed himself of the opportunity, and during his later years on the bench devoted much of his time and attention to the needs and interests of juvenile delinquents. The value of his services in this field cannot be overstated. To him the wreck of a young life was inexpressibly tragic, and no effort on his part was too great a price to pay to save or redeem it. His services in this connection, through solicitous care, wise and impressive counsel, untiring patience, and unlimited zeal, are perhaps his greatest monument. The record of his judicial services embodied in the published reports of this court, extending from Vol. 87 to Vol. 166, speaks for itself and requires no further eulogy in this presence.

Judge SMITH was a good lawyer and a good judge, but he was a better man, and it is for his human qualities that he was most beloved and will be most gratefully remembered. His love of justice, his comprehensive charity, and unfailing kindness have already been referred to. He was public spirited in a high degree and took active interest in all movements calculated to ameliorate the suffering and improve the conditions of his fellow men. He reflected much and on great themes—the social and moral well-being of the community, the improvement of industrial conditions, the relations of capital and labor, the care and protection of the helpless and dependent, the relations of man to his Maker,—indeed on all the great problems of life and death, of the here and the hereafter. Although not directly identified with any church his nature was deeply religious, and he had an abiding faith in the ultimate triumph of good.

He had a peculiar fondness for biography and had an intimate knowledge of the characteristics of the public men of America. He knew and loved good literature and had a distinct sense of style. His own speech and writing at its best had a fine literary quality.

But it was in his social relations that Judge SMITH's qualities found their highest and fullest expression. He was strikingly individual in manner, thought, and speech, Lincolnesque in his quaintness and spontaneity. He had a genius for companionship and attached great importance to the mellowing influence of social contact in breaking through the crusts of convention and the walls of prejudice. While temperate in his own habits, he often justified the social glass on this ground. On a vacation outing or around an evening board, in a company of congenial friends, his spirit shone with exceptional brilliancy and charm. Whatever turn the conversation took, whether grave or gay, he was equipped to lead it. On such occasions, philosophic reflections, homely wisdom, apt anecdote, broad humor, sparkling wit, and flashing repartee followed each other in rapid and easy succession. The haunts he frequented and the friends he knew will be duller and sadder for his absence.

And so he lived his life,—thinking deeply, serving faithfully,

feeling kindly, radiating sunshine and cheerfulness wherever he went. His life was long and useful, and when the summons came he was neither afraid nor unwilling to answer the call. He had already passed the allotted span and was facing his four-score years. He was too philosophic to be deluded into the belief that this world held much more of joy or comfort and he cheerfully joined the gentle spirit of the dear companion of his stronger years. *Requiescat in pace.*

Mr. Chief Justice WINSLOW responded:

It was not my good fortune to know Judge SMITH in his early life, but during the quarter century just prior to his death I had the great privilege of a close and intimate acquaintance with him.

It is not easy to put into words a just and appreciative estimate of that rare and lovable spirit. Able he was and learned, and yet one would not say that he was, what the world at least calls, a great lawyer. Unquestionably he must have been a powerful advocate, especially in any cause which appealed to his sympathies and his sense of justice, but it was not this which distinguished him above his fellows, nor was it any exact or exhaustive knowledge of the law. It was rather his all-embracing sympathy with his fellow man, and especially with the young.

George Eliot has well said, "The only true knowledge of our fellow man is that which enables us to feel with him—which gives us a fine ear for the heart pulses that are beating under the mere clothes of circumstance and opinion."

Judge SMITH felt with his fellow man of every walk in life and heard his heartbeat. The memorial very truly says that modern business with its glittering financial rewards did not attract him, nay it rather repelled him; his thoughts flowed in very different channels; he was a democrat of the democrats and the welfare of man was his passion. Money had no value save as it gave him the means to advance the happiness of his less fortunate brother. It would have been impossible for him to administer the criminal law as a judge unless indeed it was liberally tempered with mercy. His heart may have carried him too far at times, but if so his error was the error of the earnest soul which yearns to realize in very truth the parable of the good Samaritan. We can be very charitable to such errors now that his loving heart is forever stilled.

But it was youth that interested and moved him most. It is safe to say that no young person ever came within the range of his immediate influence who did not feel the touch of that generous sympathy which was always his. He desired to be of help to every youth he met; he sought to aid him in reaching his ideals; he saw the possibilities, and he saw the dangers and difficulties in the path, and he

longed to see the possibilities realized and the difficulties and dangers removed. Had parental neglect or untoward circumstance led on to crime? He was ready to do all that was possible to bring about reclamation of the erring heart and make of the offender a good citizen instead of an enemy of society. Had misfortune or poverty closed the door of opportunity to the deserving? He opened that door if it was possible for him to do so. He was the friend of the friendless, the adviser of the widow and the orphan. He ever stood for the higher things of life, for the things of the mind and soul, for higher ideals, for civic righteousness, social justice, right living, and the betterment of living conditions. He was in the highest sense a great citizen. And then what a wonderful companion he was! In his serious moods how helpful and wise and kind, in his merry moods how delightful! It is quite impossible, for me at least, to do justice to that deliciously whimsical humor, never caustic, but always keen and pat, which bubbled from his lips without effort and without stint and with a sparkle like that of champagne. It made him the life of any gathering, and especially of any gathering of the bench and bar. In his death the bar loses one of its best loved members, humanity a knightly soldier, and the state one of its most useful citizens.

He died in the fulness of years. He was very weary and content to go. Others will take up the tasks which his tired hands laid down, but in the hearts of those that knew and loved him there will be a vacant place which must ever remain unfilled.

E. W. KEYES.

On the 28th day of April, 1919, Mr. T. C. Richmond of Madison addressed the court as follows:

May it please the Court:—The committee appointed by the bar of Dane county to prepare a memorial to our late friend and brother, Hon. E. W. KEYES, to be spread upon the records of this court, respectfully submits the following:

Memorial of the Dane County Bar Association.

ELISHA W. KEYES was born January 23, 1828, in Northfield, Washington county, Vermont, and died at his home in the city of Madison, Wisconsin, November 29, 1910. He was the third son of Captain Joseph Keyes, one of the early Wisconsin pioneers. The family left Northfield, Vermont, May 2, 1837, to find a home in the West, and arrived at Milwaukee June 17, 1837. Later they removed to the town of Lake Mills, Jefferson county, and at the time of their arrival there was but one other family in the township.

The education which Mr. KEYES received was mainly in the com-

mon schools, although later he attended several terms at Beloit Seminary. On the 6th of December, 1850, he entered the offices of Collins & Smith in this city as a law student, the firm at that time being composed of A. L. Collins, afterwards circuit judge, and George B. Smith, subsequently attorney general of the state. October 17, 1851, Mr. KEYES was admitted to the bar of Dane county and at once entered upon the practice of law. In 1853 he was offered and accepted a partnership in the firm with which he had studied law, and the firm became known as Collins, Smith & Keyes and so continued until the election of the senior partner, Mr. Collins, to the bench of the circuit court, and from that time on the firm continued as Smith & Keyes until 1862, when it was dissolved by mutual consent.

In 1859 and 1860 Mr. KEYES was district attorney of Dane county, and in April, 1861, he was appointed by President Lincoln postmaster at Madison, and subsequently was reappointed by Presidents Johnson, Grant, and Hayes, serving continuously as postmaster in this city until 1882. In 1898 he was again appointed postmaster in this city and was twice reappointed by President Roosevelt, and later was reappointed by President Taft, and was serving his ninth term in that capacity at the time of his death.

Mr. KEYES was regent of the State University for twelve years, and was elected to and served in the Assembly of this state in 1882.

In 1871 the secretary of war appointed him as special attorney to represent the United States in the arbitration between the government and the Green Bay & Mississippi Canal Company. The arbitration board consisted of Hon. Paul Dillingham of Vermont, ex-Governor William Larrabee of Iowa, and ex-United States Senator James R. Doolittle of Wisconsin. This was a very important matter, both to the government and to the people of the state, and great credit was given to Mr. KEYES for his management of the case from beginning to end.

In 1889 he was appointed by Governor Hoard municipal judge of Dane county to fill a vacancy, and in April of that year was elected to that position by the people of the county to serve out the unexpired term of Judge A. B. Braley, which terminated January 1, 1893.

Mr. KEYES as a man was always vigorous, fearless, aggressive in any work he undertook. Born in the Green Mountain state over ninety years ago, he came to Wisconsin in 1837 a child under ten years of age. He found wild beasts, wilder men, a new, undeveloped country, but nature kindly, genial, generous, bountiful. He breathed an atmosphere of freedom, and had all the experiences and endured all the hardships and privations of the early settlers, but he also had the opportunities a new country always offers to the courageous, fearless, adventurous soul. He saw the wave of immigration flow in, the prairies tilled, the forests felled, government organ-

ized, and a new civilization built up; and from the nature and character of the man he was a part of all he saw. He seemed born to command, to take the lead, to direct, to control. His aggressive spirit was impatient under restraint. He wrote his life into the history of the state.

He forsook no friend. He feared no foe. With a combative nature such as few men possess, he was genial, generous, kindly, whole-souled, lovable. He walked life's long road making his own way, fighting his own battles, carving out his own destiny, hopeful, yes confident, of his future. When he came he found a wilderness, savagery, isolation. When he passed away he left beautiful gardens, fruitful fields, a higher civilization, people of every name and clime and creed, forming a state one of the most advanced and progressive in the world.

The whole panorama from barbarism to enlightenment passed before his eyes, and he was an active and eager participant in all the work necessary to bring about the change. He had a nature that adapted itself to, that felt equally at home with, both the lowly and the exalted of earth. If it be said he had his weaknesses, his faults, that is only equivalent to saying he was human, and he never made, nor do his friends now make for him, any higher claim.

Trace the boy from his New England home, follow him in his journeyings in this wild new country, observe the energy with which he grappled, and the courage with which he surmounted, the privations, hardships, and difficulties that met him at every turn, note the commanding position he assumed, and the right of leadership so readily, and for so long a time, conceded to him by his associates, many of whom were men of great endowments and influence, and we are convinced at once that he was no ordinary man. He started life's work as a lawyer, and had he devoted all his time and energy to his chosen profession he would easily have won and held a place among the great leaders of the bar. He lived in a time when great public issues were at stake, when the courage and the patriotism of men were tested, when even the life of the nation was in danger, and the excitement and conflict of politics called him into that field where the really great battles of his life were fought. More than any other man of his time, for a long period, he commanded the political forces, he dictated the public policy, and controlled the public patronage of the state, and yet no charge of graft, of amassing great wealth out of his position of leadership, was ever brought against him.

In his later years his life was much like the close of a somewhat stormy day, when the sun makes indescribably beautiful the western sky with its golden glow. Old friendships were renewed. Resentments were buried. The asperities of life were softened. Enemies were forgiven. Animosities and feuds, if they ever existed, disap-

peared entirely, and he occupied a warm corner in the hearts of our people. Not a voice was raised in opposition to his appointment to the position he so worthily held, and splendidly filled, at the time of his death. That fact is an honor to him and a credit to us.

His last years were spent in faithful, efficient public service. To him was accorded the great privilege of remaining in full possession of all his faculties till the messenger of death came. He died in the harness. Yesterday at his desk, discharging the duties of his office, his mind clear, his voice strong, ringing, and authoritative as of old, enjoying life, meeting and chatting with friends, bearing in his walk and conversation a promise of many years of life, labor, and enjoyment. Today among the unnumbered dead.

No pain, no lingering illness, no burden either to himself or to friends, the strong man, the vigorous personality, the fully equipped worker, passed from our sight and left us old friendships to recall and pleasant memories to cherish. As in many ways he rendered himself dear to us, we shall not soon forget him.

T. C. RICHMOND.
HARRY L. BUTLER.

Mr. Chief Justice WINSLOW responded:

The career of ELISHA W. KEYES was a most remarkable one. It spanned the history of the state and the territory. He had personal acquaintance with practically all of those great characters who moulded the history of Wisconsin in the forties, fifties, and sixties, and whose figures now seem so shadowy and far away, and yet it was but yesterday that he was here; alert, strong, and masterful, actively taking his part in the affairs of the nation, the state, and the community.

There have been other long lives among our public men, and there have been careers more brilliant, but it can confidently be said that there has not been among them one who wielded so much power for so long a time and who so fully retained his hold upon the activities of life until he had passed four-score years. During his long life he witnessed many great events and he could say with Æneas of old not only that he saw them but that he bore a great part in them.

It is true, as indicated in the memorial, that Mr. KEYES at an early period in his career drifted out of professional labors and so never attained that rank as a lawyer which his abilities and untiring energy fitted him to hold. In conversation with him at one time soon after I came to this bench he told me how it happened that he abandoned the law for politics. We were speaking of Judge Pinney's career as a lawyer and judge and Mr. KEYES said, "Do you know how it came about that Pinney became a great lawyer and I became a mere politician? Well, I'll tell you. We commenced to

study law at about the same time, and we were nominated as rival candidates for the office of district attorney, he by the Democrats and I by the Republicans; we made a hot campaign and I was elected. Pinney was disgusted by his defeat, went back to his profession, practiced law assiduously, gave up politics, and became a great lawyer. I was so delighted with my victory that I stayed in politics, became postmaster, then chairman of the Republican State Central Committee, and never really practiced law again."

The statement was doubtless somewhat overdrawn but substantially true. The game of politics had far greater attraction for a man of Mr. KEYES's temperament than the practice of the law. He had the sporting instinct, he was a good organizer, a strong leader, a tactful dealer with men, and a man of dauntless courage. Moreover, the Republican party was an enthusiastic, young party, moved by great ideas, and just entering on a career of almost uninterrupted victory which was to last for many years. The lure of politics was never stronger than it was then.

That his success was phenomenal goes without saying. I think no man has ever so completely dominated a great political party in Wisconsin for so many consecutive years. He did not seem to desire high office for himself, but he thoroughly believed that it was best for the country that his party should win and he used every means within his power to make it win. Some of the political methods regarded as quite legitimate in those days would not be countenanced now. He used them as all party managers then used them, but he made no claims of exceptional political virtue nor did he pretend to be any more honest than the manager of the opposing faction or party. He fought hard, but he fought in the open and without personal malice. When the battle was over it was *all* over with him, at least until another campaign came on. He had many strong personal friendships and they were never affected by political differences.

The fact should be noted also that, notwithstanding his constant political labors, he always favored nonpartisan judicial elections, both in principle and in practice. I can testify to this fact from personal knowledge.

My intimate personal acquaintance with him commenced in the later years of his life after his stormy career as a political manager was over, and it was of the pleasantest character. As the memorial truly says, all resentments had then been buried, animosities had been forgotten, and his life went on restfully and almost gently, like a broad river which has reached the plain after passing through long miles of tumultuous rapids.

We shall see no such career again, for it would not be possible again. The conditions which were largely responsible for it can never be the same. Pioneer characters do not return because pion-

eer conditions do not return; nor will the political conditions which made possible Mr. KEYES's marvelous career of political control ever return; but when the history of Wisconsin during the last half of the nineteenth century is written, it will be found that Mr. KEYES's name will be writ large on very many of its most important pages.

HENRY M. LEWIS.

Mr. Rufus B. Smith of Madison presented the following

Memorial of the Dane County Bar Association.

May it please the Court:—HENRY M. LEWIS, one of the oldest members of the Dane county bar, died at his home in Madison on the 26th day of December, 1915. In accordance with the ancient and honored custom of lawyers, the Dane county bar has deputed to us the duty of making formal announcement to the court of the death of our brother lawyer and of presenting some memorial concerning his character and services.

Mr. LEWIS was born in Cornwall, Vermont, September 7, 1830. When sixteen years of age he removed with his parents to Dane county, Wisconsin, in which county he resided, with the exception of one year at Hudson, Wisconsin, continuously from that date until his death in 1915 at the ripe age of eighty-five years.

During his first winter in Wisconsin the teacher of the school which he was attending died, and Mr. LEWIS was at once employed to teach the school, which he did, completing the term. After the end of his services as a teacher he attended one term as a student at the University of Wisconsin.

In the winter of 1852 Mr. LEWIS became a law student in the law office of Vilas & Remington, and later studied in the office of Collins, Smith & Keyes. He was admitted to the bar in the circuit court for Dane county in October, 1853. Immediately after, he removed to Hudson, Wisconsin, where he practiced for one year, and in 1854 he returned to Madison, which became his permanent home.

September 1, 1858, Mr. LEWIS was married to Miss Charlotte E. Clarke, who died August 16, 1884. To this union there were born three daughters, one now deceased, and two, Mrs. Skinner and Mrs. Briggs, still residing in Madison.

The public services of Mr. LEWIS, briefly stated, were as follows: He was a member of the common council of the city of Madison in the years 1864, 1865, 1866, and 1867. He was one of the directors of the Madison Free Library continuously from 1875 up to the time of his death. He was appointed collector of internal revenue by the President of the United States in 1867 and held that office for five years.

Henry M. Lewis.

Mr. LEWIS was United States attorney for the Western district of Wisconsin for nine years commencing in 1878, and was for some years assistant United States attorney. During his administration of those offices there were tried very many important cases. In the prosecution of offenders against the laws of the United States he was indefatigable in the collection and preparation of the evidence and very strong and forceful in the trial of the cases.

In July, 1898, he was appointed referee in bankruptcy by the district court of the United States for the Western district of Wisconsin, and the duties of that office were discharged by him continuously from that date until the day of his death. It was an office of great dignity and responsibility and its proper administration required a great amount of labor. It may be said that in the administration of that office he showed himself to be a learned, able, and just judge. It was a very laborious position, but he administered it without assistance until near the end of his life, when failing physical powers rendered necessary some assistance.

The death of Mr. LEWIS was a great loss to the state and the community in which he lived and labored, to the friends who loved him, and to the profession which he honored.

In every place in the public service to which he was called he exhibited a marked devotion to duty and a bravery which kept him to the line of his duty regardless of all consequences which were personal to himself, and an integrity so marked that it was recognized and admitted by all. Modern degeneracy never reached him, as unfortunately it seems to have reached some public servants in these later days. Some of his public service, perhaps the most important part of it, was rendered many years ago. Some are yet living who know that in the strict performance of his duty, and in the execution of the law, he persistently disregarded the commands of dictators in his own party, and braved and finally received official decapitation, solely because he would not prostitute the great powers of the office he then held to the carrying out of plans and projects that had for their aim only party success, and which took no note of the majesty of the law and of the duty of a public officer to uphold it simply because it was the law.

If any man ever dreamed that in any of the offices he held in his long life HENRY M. LEWIS would swerve a hair's breadth from the strict line of his duty as he understood it, that man certainly realized his mistake if he ever had the temerity to attempt to induce such deflection. As a public servant he left a record of which his brethren are proud, and furnished an example of devotion to duty which we commend to those who aspire to a place in the public service.

Our brother LEWIS was a lawyer at this bar for more years than many of us have lived upon the earth. His service at the bar was in every respect creditable. He was a lawyer of much more than ordi-

nary ability. While not a student in the sense that some lawyers are, he knew the great and fundamental principles upon which all law rests; his sense of fairness and right was so keen, his general information and knowledge were so extensive, that he was while at the bar an able practitioner of the law. To him was intrusted a large share of the varied interests, all of them important, which come to lawyers to handle and work out, and it can truthfully be said that none of these interests suffered in consequence of any inattention or lack of ability on his part.

While he was strong and able, the thing, we think, for which he will be longest remembered was his incorruptible integrity. He was an honest lawyer. By this is not meant simply that he was honest with his clients in financial matters; that can truthfully be said of the great mass of lawyers. Mr. Lewis was honest in all of his mental processes. He never deceived a court or a jury. Above all, he never deceived his own clients. No matter how inviting the adventure might be, no matter how great the apparent reward might be, no client ever received from him advice that was not honestly and conscientiously given. While his opinions were not always infallible, they were always given with profound conviction on his part that they were right. The importance of such a line of conduct can hardly be overestimated. Who can measure the pain, suffering, and loss which can result and probably will result when lawyers advise clients into lawsuits simply for the money that can be made thereby, without any rational hope or expectation of benefit to the client.

In his professional life he was not mercenary. He loved service. He rendered service with less regard for compensation than most lawyers have. No client, however poor, appealed to him in vain; no wrong ever went unredressed because the sufferer could not pay him. Those who knew him best must believe that a large balance stands to his credit on the eternal books, which represents his labor for those who could not pay him for what he did.

His brethren at the bar feel that his whole history as a lawyer is one in which we are justified in taking pride.

As a friend Mr. Lewis was dear to many hearts. Few men gained friends and kept them as did he. Always genial, pleasant, and companionable, even strangers were drawn to him as soon as they met him. There was nothing feigned or assumed about his geniality. It came from his heart. He was loyal to his friends, and his friends were loyal to him. He outlived many of the most intimate friends of his early manhood. In beautiful Forest Hill rest large numbers who when living loved him, and whom he in return loved, but their places were soon taken by others who came to know and appreciate his many splendid qualities, and it is safe to say that when his labors were ended there was no living person who knew him who did not feel a pang of regret at his death.

Henry M. Lewis.

We, the members of the bar, brought into more intimate relations with him than others by reason of our professional work, all keenly feel his loss. Other friends may be gained in the years that are in store for us, but none will be dearer than he whose taking off we today commemorate.

In accordance with ancient usage, we respectfully ask the court to direct that this imperfect memorial of his life and service be perpetuated upon the records of the court.

Respectfully submitted,

RUFUS B. SMITH,
T. C. RICHMOND,
BURR W. JONES,
Committee.

Mr. Justice SIEBECKER responded on behalf of the court:

On occasions of this kind we are naturally inclined to speak words of a personal character, and my acquaintance with Mr. LEWIS is such as to lead me to speak of him in this manner.

We had never met or known each other when, upon my application at his office, I was immediately admitted to the privilege of studying law there throughout the period of my attendance at the University Law School. In his customary quiet manner, with few words, he at once impressed me with his generous impulses and kindly interest. Without formality or restrictions I was received to share freely every facility connected with his law business. He seldom asked for any service in return for these benefits. In this relationship I became acquainted with the qualities and manner of the man and learned in some degree to know him as a lawyer. It was apparent that he had little talent for the detail administration of a lawyer's business, and that he was happily associated with Mr. Herbert Lewis, who was exceptionally qualified to attend to these affairs.

Mr. LEWIS possessed legal talents of a high order. His mental grasp was clear, his logic was persuasive and convincing, and his judgment in applying legal principles to a state of facts was practical and sound. It was not his practice to make extensive research for decisions of the various courts to fortify a principle of the common law, but he devoted much thought and attention to ascertaining what accepted principle governed the facts of any controversy. It was his habit to acquaint himself with the facts and then, in the quiet of his office, to search his store of legal knowledge for the rule of law that governed them. The result of this work led him to clear and self-supporting conclusions and made illustrative adjudication superfluous. His trial work was exceptionally effective in eliminating irrelevant matters and singling out with peculiar directness the point on which the controversy turned. He despised all

subterfuges and tricks and had the power to sense wilful transgressions in these respects and bring them to the attention of the court and jury. A marked feature of his trial work was his straightforward and candid attitude regarding the actual facts of a case. Whatever he saw as fact was so treated without quibble or cavil. This led juries to accept his position with confidence and reliance and to protect diligently the rights of his clients. His career as a lawyer was a notable example showing the power of a candid, earnest, and justice-loving lawyer in the administration of justice. It was such attributes as these, rather than the arts of exposition and oratory, that impressed the listener with the righteousness of his cause and aided judge and jury in giving an intelligent and unbiased consideration to the actual merits of a controversy.

Mr. Lewis had no desire or inclination to prosecute his professional labor for mere pecuniary gain. He often spoke frankly on this subject and deplored what he termed the modern tendency towards commercializing the professional function. To him the primary and ideal object of a lawyer's life was to be an agent of justice; the recompense his labors might bring was, to him, a secondary matter. These estimable attributes of his personality always led him in the discharge of his duties as a public official. As has been pointed out, his clear sense of right, his integrity of mind, and probity of character resented any suggestion of deviating from the strict performance of official duty for ulterior purposes to further private interest, and we who knew him well know that he stood courageously and firmly for what was right, regardless of great personal loss and sacrifice. In his private life he exhibited the same sterling qualities of character. Under the strain of misfortune he cheerfully gave all he had lest it might be thought that he shirked his obligations. The people of Madison were not unmindful of his worthiness, and showed their respect and confidence in the many ways stated in the memorial.

I am moved to speak of Mr. Lewis's personal character as displayed in his life as a citizen and member of his local community. In these respects he was a reliable yoke-mate to help carry the burdens of the community service. As citizen he cherished an abiding faith in the excellence of our system of government, and looked upon the conception of human rights as expressed in our fundamental laws of the land as one of the highest achievements for human happiness, and that they offer to a free people the best means of securing human blessings. His interest in contemporary practical and social questions never flagged; he approached them freed from conventional and traditional notions and tested them in the light of experience and the advanced knowledge of his time.

For charity he had a sympathetic heart and a free purse. When-

ever an appeal for the helpless and afflicted came to him he knew no bounds to his generosity and transgressed the limits of his ability to give them aid. His religious affiliations and interests were very dear to him. He was very active and devoted in sustaining and promoting them for the diffusion of what he conceived to be ennobling ethical ideals and religious sentiments, in the spirit of the freedom of the truth. He sought to fulfil these convictions and aspirations by a loyal adherence to the values of human life and a conscientious effort to so live as to secure the undebatable gifts that feed the higher life by making the most of home, children, friendship, going about doing good and spreading the spirit of kindness, joy, and peace through mutual human living along ideal lines.

I was privileged to know that he was actuated by these lofty and ennobling motives. How perfectly he fulfilled these ideals can only be measured by an unerring judgment for evaluating his acts and deeds. Measured by human standards, we can say that he met these life purposes like a good soldier "who never turned his back but marched breast forward; never doubted clouds would break; never dreamed, though right were worsted, wrong would triumph."

FRANCIS JONES LAMB.

Mr. Burr W. Jones of Madison presented the following

Memorial of the Dane County Bar Association.

May it please the Court:—The committee appointed by the Dane County Bar Association herewith presents to the court the following memorial of the life and services of the late FRANCIS JONES LAMB:

FRANCIS JONES LAMB, descendant of ancestors who came from England about ten years after the landing of the Mayflower, and son of Aaron and Alma Castle Lamb, was born at Canandaigua, New York, March 2, 1825, and died at his home at Madison, Wisconsin, January 23, 1916.

Until twenty-one years of age he lived upon a farm with his parents, making the most of rather meager chances for an education and incidentally receiving the discipline which the pioneer life on a farm in Western New York in those days was well adapted to give. He attended an academy in Canandaigua for a short time and afterward studied law, and until 1857 practiced law in that village.

In 1857 he gave up his practice in New York and removed to Madison, Wisconsin, where he continued in the practice of the law with but slight interruption until 1904. His first partner in Wisconsin was William Welch. Afterward he formed a partnership with Philip L. Spooner which continued for several years. Mr. Spooner

was then advancing in years, but there were few lawyers, if any, in the state better grounded in the principles of the common law, and Mr. LAMB always greatly prized this association with one whom he greatly admired. John C. Spooner, afterward United States Senator, was for a short time a member of this firm, which was then known as Spooner, Lamb & Spooner.

About 1870 Mr. LAMB became associated with General George B. Smith, who was one of the most brilliant orators and advocates of his generation in this state. This partnership continued during the life of General Smith and until 1879. The firm was one of the leading firms in Wisconsin, having in charge the legal business of the Chicago & Northwestern Railway Company in Wisconsin and carrying on a large general practice. It was at a time when the power of the state to regulate railroads under the celebrated Granger Act was being contested, and Mr. Smith and Mr. LAMB, in behalf of the railroads, took an important part in this historic litigation.

In his later years Mr. LAMB was full of reminiscences in which he delighted to tell of the wit and eloquence of his former partner, whom he thought the prince of lawyers.

About 1880 he and Burr W. Jones formed a partnership which lasted for about eight years. On the dissolution of that partnership he was successively associated with his son, Charles F. Lamb, T. C. Richmond, and Ralph W. Jackman. For almost forty-seven years Mr. LAMB was actively engaged in the practice of the law in the city of Madison, and 106 volumes of the Supreme Court Reports were issued during this period, his first case having been reported in Volume 9 and his last in Volume 115. During all this period he bore his part in the trial of the wide range of cases which came before him, but he felt most at home when associated with a partner who enjoyed the forensic struggles of the bar. He was always prepared in the circuit as well as the supreme court with careful briefs on every phase of the case. His wide reading and retentive memory, his untiring industry, his mastery of every fact and every question of law, his readiness and ability in arguing the legal questions arising at trials, his business ability, his sterling integrity and sound common sense made him a delightful and invaluable partner in the practice of the law. For many years the younger lawyers were accustomed in a friendly way to seek his advice on the knotty problems which arose in their practice, and no one could give such help more satisfactorily or in a kindlier spirit.

So far as we know, Mr. LAMB never sought political office in Wisconsin. His life affords a good illustration of the fact that while strict and conscientious devotion to a great profession is in no way inconsistent with the performance of the high duties of citizenship, it is sure to bring that public confidence, affection, and personal independence which are their own sufficient reward.

Francis Jones Lamb.

For nearly sixty years Mr. LAMB was an active member of the Congregational Church of Madison. During all these years he gave liberally of his time and his means in helping to bear the burdens of his church. By nature he was a conservative, and during his long life he staunchly upheld the doctrines which he believed to be the basis of the Christian religion. He gave to his profession and his church the unstinted service of his long and useful life, fully realizing that in this service were included his love for his family and his duty to the state and to the community in which he lived.

Mr. LAMB's strenuous work in his profession and his devotion to his church undoubtedly gave to his life its serious aspect, but there was another aspect which only those who knew him well could understand. He had a delicious sense of humor which found expression in an inexhaustible fund of stories, apt scriptural allusions, and quaint old sayings. This fund of humor brought constant surprises and helped to make him a most interesting companion.

He was trustee of Ripon College for many years and was President of the Wisconsin Home Missionary Society for more than twenty years.

When he no longer thought it necessary for him to continue in the work of his profession and when he was in the full possession of all his faculties, he wrote a book which was much praised in the secular magazines and which was entitled "Miracle and Science," in which he sought to establish by the rules of legal evidence the truth of the scriptural account of the miracles. Numerous shorter essays by him on religious subjects were published by the Home Missionary Society.

Almost up to the time of his death and when he was more than ninety years of age, he continued his work and his writing in support of the Christian faith, and thus cheerfully and happily passed the last years of an age so advanced that the few who reach it generally long to be relieved by death from its suffering and decrepitude.

After Mr. LAMB had passed his ninetieth birthday the members of the Madison bar gave to him and three others of its oldest members, all past eighty, a complimentary dinner. We all remember the merriment and good cheer of those veterans of the bar in the late evening of their lives as their younger associates listened to their reminiscences of pioneer days.

We respectfully ask the court to direct this memorial to be perpetuated upon the records of the court.

Respectfully submitted,

BURR W. JONES.
JOHN M. OLIN.
T. C. RICHMOND.

Mr. Justice SIEBECKER responded:

Mr. LAMB, as one of the pioneer lawyers of Dane county, is permanently associated in my memory with the early traditions of the legal profession. It was during my preparation for and the beginning of a lawyer's life that I first learned to know him. He was then prominently in the front rank in the trial of cases before our local courts as an associate of General George B. Smith. Their splendid team work in legal contests was so evident that even a novice could not help but notice how effectively they marshaled their forces and brought them to bear on court and jury. General Smith, silver-tongued and full of pathos, aroused the mind and heart whenever he spoke to court or jury. Mr. LAMB, prepared for every detail that might present itself in the shifting scenes of the contest, permitted no phase of fact or law to escape the attention of judge or jury. The witnessing of such contests taught the beginner his first lessons of actual practice. We learned to appreciate the powers and abilities of these practitioners and were soon enlisted among their admirers.

It was natural that we should seek the aid and support of these experienced men who were looked upon as honored and influential men in the community. Mr. LAMB, though reticent and uncommunicative respecting personal and professional affairs, invited the confidence of the younger practitioners and gave freely of his knowledge to help them solve their perplexing problems. In this respect he evinced an interest akin to paternal solicitude in his watchful care and aid to protect the beginner against the unexpected pitfalls which always beset him in legal warfare. The bar memorial deservedly speaks of his accomplishments as a well-read lawyer. His knowledge of the decisions of this court was unusually thorough and enabled him to turn to them to meet questions unexpectedly arising in the progress of a trial. His talent for thoroughness in detail was manifested whenever a question of statutory law arose. He searchingly scanned every word and its scope and significance. On many occasions I observed him in trial courts, although not engaged in the case on trial, suggesting to court and counsel that the pending question was governed by a statute. This talent also gave him distinction as a careful pleader and painstaking practitioner in making up the record of a case. I think it to be without exaggeration to say that his professional standing was high in this respect and that he was an authority in the practice of perfecting judgments and in enforcing their performance. He appreciated to the fullest that a lawyer's obligations to his client do not cease upon the rendition of a decision by the court or by the verdict of the jury. He conscientiously saw to it that his client received the fruits of any litigated or other legal matter intrusted to his care.

In his personal and social life Mr. LAMB displayed a retiring disposition and confined his activities within a limited circle. I was impressed that he entertained the belief that a person's most efficient contribution to the general welfare must be accomplished through an upright and efficient conduct of one's individual affairs and personal conduct. This characteristic probably led him not to seek public office and to devote his talents and his time in painstaking devotion to the discharge of his duties as a lawyer, a business man, and the obligations of a husband and father. These attributes and qualities of Mr. LAMB showed the serious and earnest traits of his personality, but there was coupled with them a keen appreciation of the delights that flow from quaint anecdotes, mirth-provoking stories, and the play of the comic and ludicrous, connected with the actual experiences of life. His memory was replete with such experiences and he had the art of presenting them in all their native atmosphere. On social occasions it was a treat and entertainment to have him recount his experiences of this nature and participate in the pleasure he felt in such reminiscent moods.

Mr. LAMB will be remembered by his brother lawyers, his clients, and his friends as a man of integrity, as a lawyer of ability and trustworthiness, as a capable business man, and as a good citizen. To be held in such esteem by his contemporaries is the best credential of his manhood and the highest testimonial to his successful career in life.

JOHN A. AYLWARD.

Mr. M. B. Olbrich of Madison presented the following:

May it please the Court:—The Dane County Bar Association presents this memorial to JOHN A. AYLWARD, who died in the city of Madison on November 12, 1916, and prays that the same be made a part of the records of this court:

Memorial of the Dane County Bar Association.

Into an atmosphere of love and loyalty and Celtic fervor, JOHN A. AYLWARD was born at Black Earth, Wisconsin, on the 16th day of March, 1861. One of a family of nine children, the genius of Irish peasantry transformed the humble cottage in which they dwelt into the magic palace of a home. The low roof that sloped above his sleeping boyish head did not "cabin," "crib," or "confine" his spirit, but rather served as an inverted easel on which his toes, in mixture of childish mischief and ambition, might trace out the far-flung empire of his dreams. The snow sometimes sifted in upon his coverlet, but the cracks through which it came let in the light and inspiration that shone down "O'er heaven's blue threshold" from "the great unconquered stars above."

John A. Aylward.

Freed from the vitiating handicap of wealth and social position, he breathed the ozone of the pioneers and found hardship but a virile tonic. In his schooling, the philosophy of lengthened adolescence found little stress. Education meant use of the pick and shovel on the railway section; work as mason's helper at the mortar box; teaching country school; attendance at the University; after graduation there, five years more teaching high schools; study and reading in vacations; a year at the law school, and at last in 1890 the goal of his heart's desire—admission to the bar.

Aspiration for growth and intellectual power led him to reject a political sinecure at $1,800 for a clerkship in a law office at $400 a year. This desire for growth continued strong until the moment of his death. His life was no mere succession of sleepy intervals punctuated by heavy meals. His were "the long days of labor and nights devoid of ease." The arduous business of trying his cases actually seemed to afford him delight. A routine that led him into the office at half-past seven in the morning for preparation until the opening of court, a brief fifteen minutes respite at noon with a cup of coffee and a bowl of bread and milk, further preparation until court opened, after court back to the office at night, resulted in no apparent flagging of spirits, no dulling of faculties, even though, as sometimes happened, this extended into weeks. No man could more nearly measure up to the Spartan requirements of Kipling's queried test for manhood:

> "If you can force your heart and nerve and sinew
> To serve your turn long after they are gone
> And so hold on when there is nothing in you
> Except the Will which says to them: 'Hold on.'"

But his temperament was far removed from that of a mere pedantic and laborious plodder. He possessed a keen sense of the ludicrous and one never knew when some unexpected quip or sally might convulse court and jury and spectators. His sense of humor was not synonymous with amiable futility. In the trial of a case he was no mere chip afloat and adrift on the current of circumstance. He took no toll from his clients on the theory that he guided a stream down which they were all merely drifting. The successful outcome of a lawsuit with him was something more than an unpremeditated accident. He had a definite objective and the facts all were marshaled to definite ends.

Without preparation he seemed able, in the intervals of the trial, with his marvelous industry and power of assimilation, to equip himself to a degree that might have required weeks of arduous effort on the part of another, so that while he was often unprepared he seemed never at a loss. Poise and courage, in addition to industry and endurance, he possessed in rare degree. Whatever emergency confronted him, fate never seemed to catch him unawares. No mat-

ter how unexpected a situation arose, like the brave Scots knight of old, he was "Ready, ay ready."

He was no calculating cavalier. His work was ill paid at best and often not paid at all. In the practice of the law he never had in mind merely getting rich. The line that separates the advocate from the bandit was never confused or obliterated in his mind. The uninspired satisfaction that comes from the strategic noosing of many furtive dollars in slow and patient sequence made little appeal to him.

The strange, wild lure of conflict stirred his soul. He liked to take a chance in business, in politics, and in law as well. The butt-end of a lawsuit, as some one has called it, seemed to appeal to him. He relished the challenge of long odds against him. To his eager courage, the call of a forlorn hope came like the wonderful music of a far-off battle-cry. Underneath his armor of reserve there was a buoyancy and zest about it all, a certain elemental, unadulterated boyishness, that kept his faith unchilled and sustained him in unflagging enthusiasm. He had something of the dash, the ardor, the élan, the pure joy of combat that Stevenson has pictured in "Kidnapped" when Alan Breck emerged all bloody from his hard-fought battle and, "O, Man!" he cried in a kind of ecstacy, "am I no a bonny fighter?"

Opponents sometimes thought his methods harsh. Such complaint being reported to him, his rejoinder was that "a lawsuit isn't a pink tea." But he was never disagreeable under the delusion that unpleasantness constituted efficiency. It was victory he sought, not reprisal. A prompt and unrelenting partisan, terrific in onslaught, he was not cast down in defeat and was magnanimous in victory.

Measured by whatever standard, the sum of his legal achievements is not small. The actions and trials in which he participated involved a large variety of questions and situations. He won, and deserved to win, a reputation as one of the ablest trial lawyers in the state. With his qualities and his powers, it required only opportunity or the accident of association with some great state trial to have made his name historic and placed it in the class, at least, with Choate and Erskine and the storied names of old that star the professional firmament.

Excelling as were his powers as an advocate, the qualities of the man were finer still. Some who called him cold little knew the pulsing fervor of his attachment to his ideals of professional conduct, his friendships, his religion, and his home. That overmastering principle and inmost passion of his life, loyalty, explains as well his political career. There lies the solution to the riddle of the shallow and supercilious cynics whose shortsighted vision sees in the practical business of government nothing but a realm of grotesque and gorgeous make-believe and whose souls, attuned to the symphony of

barter alone, hear no concord, only a chorus shrilling with the chaotic clamor of many tongues, the echo of the underlying thought, "What is there in it for me?"

He knew too well its sordid, tawdry treacheries and cheap betrayals, its stale hypocrisies, its dismal ironies, its drab monotonous processional of dreary mediocrities with their infinitude of pretense. But unlike his mystified and money-grubbing critics, he saw beyond the soiled and seamy side of politics and grasped its opportunity for strong, warm manhood's friendships; and through its strident riot of confusion and claptrap, caught at least in undertone, "the still, sad music of humanity," submerged, floundering, struggling, stumbling upward in its course.

He did not creep into the melancholy dusk of life to contemplate, with dimmed and deadened faculties, the mournful spectacle of the high estate of manhood and mental and moral power gone. Full-panoplied and resplendent in his strength he went, and may we not believe that such an end was neither unfitting nor untimely? He was busy in his office until after six o'clock of the last day he lived, bringing to a close full and extensive preparation for the trial of a case that was attracting attention throughout the state and in states near by, looking forward, no doubt, with eager anticipation to crossing swords with a new and skilful foeman of wide repute.

After a full day's labor he went to his home, which was indeed "the place of peace, the shelter, not only from all injury but from all terror, doubt, and division." It was not "a part of the outer world" merely "roofed over and with a fire lighted in it." It was "a sacred place, watched over by household gods before whose faces none might come but those whom they could receive with love." Its roof and fire were types "only of a nobler shade and light—shade as of the rock in a weary land, and light as of the Pharos in the stormy sea,"—so utterly it "vindicated the name and fulfilled the praise of home." And there he lay down to a sleep, untroubled, undisturbed, eternal.

Mr. Chief Justice WINSLOW responded:

The story of Mr. AYLWARD's life is a typically American story and it may be summed up in two words, namely, Struggle and Achievement. Poverty sat by his cradle, toil and hardship and self-denial walked by his side through childhood and youth, but he never lost his courage or his faith.

He saw ever before him the goal which he had chosen for himself; he knew that the road to that goal was long and rough, but he was content to pay the price without complaint. His success again demonstrates that America is the land of opportunity for all, the land where courage and industry and steadfast purpose will have its fitting reward however humble be the starting point.

Mr. AYLWARD came to the bar just before I became a member of this court and I have had ample opportunity to judge of his abilities as a lawyer. His briefs were always logical and convincing, his oral arguments strong and forceful. Both bore the unmistakable impress of the trained mind naturally strong which had reached its conclusions as the result of unremitting industry and intelligent study. There was no mistaking the fact of his ability, and if one disagreed with his conclusions it was not because of any weakness in the presentation of his case but rather because the law was against him.

Nor were his energies and abilities confined to his profession alone. He took part, as every citizen should, in the affairs of his community and his state. Public questions attracted him, and he was for years active politically though not achieving high office on account of adverse political conditions. But after all the attainment of office is not the test of the performance of a citizen's duty. It is rather by the amount of intelligent, active, self-denying labor and thought which the citizen devotes to the solution of public problems that his merits as a citizen and patriot are to be judged. By this test Mr. AYLWARD's political and public career is fully entitled to admiration and approval.

He was taken from us in the midst of his usefulness and at the very height of his powers. It seemed that he had many years of service to his profession and to his state yet before him, but it was not to be. Suddenly and without warning came the summons which none may disregard or disobey, and the able lawyer, true friend, and eminent citizen laid down his tasks unfinished, leaving a gap in the ranks which cannot soon be made good.

JOHN BARNES.

On the 27th day of May, 1919, Mr. Patrick H. Martin of Green Bay addressed the court as follows:

May it please the Court:—The undersigned committees of the State Bar Association and of the Milwaukee Bar present this memorial to Judge BARNES:

Memorial of the State Bar Association and the Milwaukee Bar Association.

It is fitting that the bench and bar turn momentarily aside to pay tribute to him departed, who but yesterday toiled as one of us.

JOHN BARNES, loved and esteemed by all who ever sensed the touch of his genial nature and knew the integrity of his life, was on January 1, 1919, while seemingly in the full vigor of manhood, suddenly called to his eternal home. We grieve the loss, while con-

scious of the judgment that rests on all men. Dismal, indeed, would be the pictures and recollections of memory were it not that faith points to a new birth.

His parents, John Barnes and Mary (Butler) Barnes, were born in Kilkenny county, Ireland. Soon after their marriage they migrated to Montreal, Canada, and still later removed to and settled on a farm in Manitowoc county, Wisconsin, where he was born July 26, 1859. He was richly endowed by his sturdy Irish ancestry with health—a sound mind in a sound body was his fortunate inheritance. The environment and necessities of his early life stimulated to industry. Patient industry and perseverance fruited in the achievements incident to youthful effort. Soon the rugged struggle waked a consciousness of a power within, of a talent, courage, and fiber to grapple with the larger problems of life. The intellectual early appealed to him. Some voice within indicated the way and aroused ambition. Each ambition realized was a stimulus to greater effort. A career that spans the way from the humble beginnings of the farm to the Supreme Bench of Wisconsin spells much of industry, toil, self-denial, and perseverance, qualities that condition the successful lawyer. He attended the country school of his native town and graduated in 1876 from the Manitowoc high school. During the succeeding six years he taught school and attended the normal school at Oshkosh, Wisconsin. He entered the law department of the University of Wisconsin in 1883 and graduated therefrom in 1885. With the large capacity for work, earnest application, and perseverance that marked his subsequent career, he finished his preparatory work with the promise of success that rewarded his later efforts.

He engaged for a short time in the practice of law at Manitowoc. In May, 1886, he removed to Rhinelander and there in a modest way began his professional career, a career of service to his native state and to his fellow man which was to be characterized by ability, integrity, and a fine sense of honor. He sensed and lived true to the high ideals of the profession, and soon enjoyed the reward of his sterling qualities in a large *clientele*. The character of his work at the bar, his capacity for clearness of thought and conciseness of expression, and the courage with which he relied upon a position deliberately chosen, are shown by this comment made by the United States circuit court of appeals for this circuit upon his presentation of a case to that tribunal in the earlier years of his practice as counsel for the plaintiff in error: "We cannot close this opinion without a word of commendation to counsel upon both sides for the admirable manner in which the bill of exceptions presented to our consideration has been prepared. The record of a trial continuing during four weeks is condensed, and the exceptions fully presented, in sixteen printed pages of this record. The paper is a model that the bar should copy after." 83 Fed. 123.

Business opportunities opened to him, and in business, as in law, he was eminently successful. He had a keen instinct for business and a marked capacity for the conduct of large affairs. He was identified, both financially and as an executive, with a number of industrial and other enterprises and mastered the details of every concern with which he was connected and contributed his personal efforts to its growth and development.

While he did not seek office he shirked no public duty. The responsibilities and privileges of citizenship were to him sacred. He served where service was required, and reckoned not the cost either in vital force or monetary loss. In his early years at Rhinelander he served a term as judge of the municipal court. He served also as president of the school board and was at all times actively identified in the cause of education in his city.

In 1906 he was appointed by Governor La Follette as a member of the newly created Railroad Commission of Wisconsin, and at its first meeting was elected its chairman. This appointment of a Democrat by a Republican was at the time recognized as one made by reason of pre-eminent ability, wholly uninfluenced by any political or factional considerations. It was well known that he accepted the position at great personal sacrifice. The work of this commission, difficult and largely experimental, was rendered doubly burdensome by the agitated state of the public mind at the time. It required constructive ability, wisdom, and courage of a high order to establish the commission in the confidence of the people, thereby to make it a valuable administrative force in the life of the state. JOHN BARNES's known integrity of purpose, independence of judgment, and keen pursuit of the right and just solution of the problems presented to the body contributed largely to the high rank it soon attained throughout the states of the Union. Mr. B. H. Meyer, who served with him, says: "I learned to know him as a man of great native ability, deliberative in all his work, wise under all circumstances, and unusually sound in his judgment. He was one of those men who are instinctively right. He was born to be on the right side of things."

After two and one-half years of service, hoping to gain a little respite from the very arduous labors entailed, he resigned his position, enjoying then and to the end the utmost confidence, good will, and esteem of the people of this state. Now, released from the burdens of public service, he enjoyed again, but for a short time, freedom and the pleasures of the practice of his profession among the friends and acquaintances that earlier association and kindred interests had endeared to him. Soon, however, he was again called into the public service. On the death of Chief Justice CASSODAY, JOHN BARNES's name came prominently before the people as a worthy successor. His election to fill the unexpired term of the beloved Chief Justice, and his re-election in the spring of 1909 for a

full term, evinced the esteem and confidence of the people in measure that was fully merited.

He brought to the discharge of the exacting duties of this position a mind well informed of the law, sound of judgment, clear of vision, and a passion for justice. His work on the bench was of a high order and marked his possession of superior judicial attainments. He listened well and patiently to the arguments of counsel, and, possessed of the power of keen analysis, close observation, and a subtle sense of humor, he revealed himself in his opinions. We shall not anticipate what the court may record of his judicial labors, yet we shall not let pass the opportunity to say, in behalf of the bar, that Judge BARNES ranked among the ablest of Wisconsin's able judges.

In 1916 he resigned as Associate Justice of the Supreme Court to accept the position of chief counsel for the Northwestern Mutual Life Insurance Company of Milwaukee, which position he held till death concluded, at the zenith of his life's work, a most useful and honorable career. The request to become so identified with the largest financial institution in the state of Wisconsin and one of the leading financial institutions of the United States is in itself a high tribute to his reputation for ability and an indication of the utmost confidence in his integrity.

We turn, however, from the man of public affairs to the individual indulging the freedom of social converse, the sunshine of companionship unfettered by the formalities due to public station, for the truly lovable nature that so endeared JOHN BARNES to his many friends. He was gentle, unassuming, kind, and democratic; he had a fine sense of humor and indulged it with pleasure to the delight of his companions. His nature was cordial, open, generous, yet marked by that quiet dignity and poise characteristic of big men. In religion he was a Catholic, and he ever held and cherished the faith sublime that illumes where reason cannot penetrate. In private no less than in public life, sterling integrity and keen sense of honor marked his daily routine. He could and did resent a wrong, and the fire of resentment glowed as he sensed the injustice. All in all, JOHN BARNES was a type rarely found.

In 1887 he was married to Miss Julia Koelzer. The friendship of childhood had ripened into love—love that founded and sanctified a happy home. He loved the life of the home and his family. He was an ideal husband and father. He left surviving, his wife, his daughters Beatrice, Fayne, and Mrs. Dorothy McGuire, and one son, John Barnes, who at the time of his father's death was with the American Expeditionary Forces in France. In the bereavement of wife and children, in the sundering of cherished friendships, in the severing of the ties that bind to earthly things, we can but bow to the inscrutable ways of God, consoled by faith and the

promise of eternal life. Hope, confirmed by faith, is the precious heritage that solves the mystery of death; then,

"Weep not, she says, at Nature's transient pain,
Congenial spirits part to meet again!
Inspiring thought of rapture yet to be,
The tears of Love were helpless but for thee!
If in that frame no deathless spirit dwell,
If Faith unite the faithful but to part,
Why is their memory sacred to the heart?"

P. H. Martin,
L. J. Nash,
C. B. Bird,
E. D. Minahan,
Committee Wisconsin Bar Association.
W. D. Van Dyke,
J. G. Hardgrove,
Nathan Glicksman,
Committee Milwaukee Bar Association.

Mr. Chief Justice Winslow responded:

Life's journey would be dreary indeed were it not for the friends whose hands we grasp by the way, and yet it is only when the silver cord is loosed and the golden bowl of friendship is broken by death that we fully realize how much that friendship has meant to us. For nearly eight years John Barnes was a member of this bench, working day by day in that close comradeship with his fellow laborers than which few relationships can be closer, and those of us who were privileged to work by his side during those years can all bear testimony to the rare and admirable qualities of his head and of his heart. We keenly felt the loss when he left the bench to take up again the work of a counselor, but still we did not feel that we had wholly lost him, for his new work called him to the Capitol from time to time and he frequently looked in upon us with the old-time cheery greeting which made it seem almost as if he were still with us; but now we realize that we shall hear that greeting and see that kindly face no more.

It is no exaggeration when I say that I loved John Barnes as a brother. From that day, now many years ago, when I first met him and looked into that calm, kindly face there has been no misunderstanding between us and no rift in our friendship, but rather a more complete confidence and regard as year has succeeded year.

It was hardly possible for any one to mistake the man, for his character was transparently honest. One always knew where to find him, and one knew, too, that he never said one thing and meant another. He was utterly and completely dependable. In thinking of him I am always reminded of the question asked by the Hebrew

prophet more than two thousand years ago, "What doth God require of thee but to do justly and to love mercy and to walk humbly with thy God?"

These things he did if any man ever did them. He sounded no trumpet before him nor did he boast of his deeds; they were simply part of the day's work; things to be done because they were right, not because they would bring glory or credit to himself. Truth and humanity and justice were the fundamentals upon which his conception of life and duty was based, courage and industry and unfailing kindness were the watchwords of his daily life. He was a gentleman because he was born gentle. Courtesy and consideration for the rights of others was as natural to him as it was to breathe. But there was no element of weakness in his make-up, no mawkish sentimentality in his gentleness. When convinced of right he stood his ground whatever the result, and when wrong or injustice moved him to righteous indignation there were for him no compromises possible.

Of his ability as a lawyer and judge it seems almost unnecessary to speak. The record is already made up in the reports of the decisions of the Railroad Commission and of this Court and it places him unquestionably in the very first rank of Wisconsin's great lawyers and statesmen. It may be said perhaps that his mental processes were not marked by meteoric brilliancy, and this is true; nor was he a natural orator who could charm great audiences with the flowers of rhetoric, but he had the more solid qualities of direct, straightforward reasoning, clear analysis, good judgment, rare business ability, convincing logic, and breadth of view. To these things he added unfailing and regular industry, and a clarity of thought as well as of the spoken or written expression of his thought which was rare indeed. In his arguments he proceeded from carefully laid premises to logical and undeniable conclusions with convincing accuracy.

Nor did he lack humor; at times, indeed, it was biting and sarcastic, especially when he was moved to strong expression by a sense of wrong, but more often it was the irrepressible bubbling over of a delicious drollery which came to him naturally as a part of his Celtic birthright.

In addition to all this he was blessed with practical, every-day good judgment; he was not to be moved by every breath of opinion, nor on the other hand was he inclined to close his mind to thought simply because it was new. He was pre-eminently

"Rich in saving common sense,
And as the greatest only are,
In his simplicity sublime."

In the consultation room he was at his best. Calm, deliberate, forceful, and logical, he played no tricks with his intellect, but followed where it led even though the result might be distasteful. His

sole aim was to find the law and then to declare and enforce it, with absolute disregard of popular clamor or the effect upon his own popularity. He made no grandstand plays, no false pretensions; he enjoyed the approval of his fellow men as we all do and he had their approval in generous measure, not, however, as the result of mere fortunate circumstance nor of a politician's skill in avoiding difficult questions, but because he met with courage every great question presented to him and performed his duty as he saw it with absolute indifference to all personal considerations.

His tragic death at the very height of his powers and his usefulness is a great and permanent loss to the profession, the community, and the state. All too soon, as it must ever seem to us, we are obliged to close the life record of the great lawyer, the just judge, the wise citizen, and the loyal, great-hearted friend. For those of us who knew and loved him there can be no forgetting. The passing years will only bring his death more deeply home; for every year will bring its own problems and with them will come the full realization that there is a vacant chair at the civic council board where formerly sat a wise and sagacious counselor, whose aid we can have no more.

But while we must always mourn our own loss there is no cause to mourn so far as our friend himself is concerned. Not only had he achieved material success, but he had earned the love and confidence of his fellow men by the unblemished purity of his character; he was universally honored and trusted; he was dealing with great affairs; he stood at the meridian; disappointments and failing powers and disillusionments were yet far away; he was thrice armed with the armor of a sure and certain faith.

"Why mourn for him? For him
The welcome Angel came
Ere yet his eye with age was dim
Or bent his manly frame;
His weapon still was bright,
His shield was lifted high
To vanquish wrong, to save the right.
What happier hour to die?"

FREDERIC K. CONOVER.

Mr. Burr W. Jones of Madison presented the following

Memorial of the Dane County Bar Association.

May it please the Court:—It becomes our duty as a committee representing the Dane County Bar Association to present to the court a brief memorial of the life of FREDERIC K. CONOVER, who for thirty-five years was the Reporter of this court.

Mr. CONOVER was born in the city of Madison on February 17,

1857, and was the son of Dr. O. M. Conover and Julia Darst Conover. He died May 7, 1919, and left surviving him a widow, Grace C. Conover, two sons, Frederic Le Roy and Julian Darst, and two daughters, Marion and Daphne; also a brother, Allan D., and a sister, Edith. The two sons are both majors in the armies of the United States.

He graduated from the Wisconsin State University in 1878 and from its Law School in 1880, when he commenced the practice of his chosen profession. A few of the older members of the bar remember his work as a lawyer during the few years which passed before he was called to his public service.

We remember his modest and unassuming bearing and the careful preparation of his cases, and we had no doubt that his keen, analytical mind, his industry, and high ideals would bring in due time the well merited rewards of the profession he had chosen.

At the age of twenty-seven he was called to succeed his father as the Reporter of this court, and since that time we have known him not in legal contests but as a skilled and faithful officer of the court; as one interested in our schools and in our city and Historical Library, for which he rendered long and faithful service.

He inherited and cultivated the love of good literature and was long a member of the Madison Literary Club.

He had a keen appreciation of the beautiful in art and was an active member of the Madison Art Association.

Although the bar of the whole state appreciates the value of the services he rendered the court and his profession, it is more fitting that the court with which he so long had close association should give its estimate of the importance of that service.

BURR W. JONES.
FRANK L. GILBERT.
JOHN B. SANBORN.

Mr. Justice VINJE responded on behalf of the court:

The death of Mr. CONOVER marks an epoch in the history of the Supreme Court Reporter's office. Since 1883 he has been the Official Reporter, editing volumes 59 to 168 inclusive. He also edited for his father, Mr. O. M. Conover, then the Official Reporter, volumes 55 to 58, inclusive, and had rendered his father frequent and valuable services before he began his work on volume 55. For over a third of a century he has been the Official Reporter of the court and has edited 113 volumes in all. It was my privilege to assist him in the work from January, 1888, until May, 1891, during which time volumes 70 to 77 inclusive were published. Abram D. Smith, one time associate justice of the court, edited volumes 1 to 11, inclusive, and Philip L. Spooner edited volumes 12 to 15 inclusive, and Mr. O. M. Conover volumes 16 to 58 inclusive, though Mr. S. U. Pinney,

afterwards a justice of this court, prepared the matter contained in volume 16 for Mr. O. M. Conover, which volume was published in 1865. It will thus be seen that this court has had but four reporters since 1853 and only two during the last fifty-four years, Mr. O. M. Conover serving from 1865 to 1883 and Mr. F. K. CONOVER from 1883 until his death the 7th instant. This is a remarkable and almost unique history in court reporting judged from duration of service. But it is far more remarkable judged from the quality of work done, and especially so by the subject of this memorial. The debt due him by the legal profession is one that but few appreciate. His whole life and energies were devoted to his official work. Equipped as he was with a university education and a fine legal training, he supplemented both with a keen, logical mind, a firm grasp of legal principles, and a wonderful faculty of clear, concise, and accurate expression. To the training and mental endowments mentioned he added unlimited patience and care in the smallest details of his work. No error was too trivial to escape his attention or to deserve correction. Nothing was taken for granted. Every statement had to meet the challenge of his analytical mind and be squared with the facts of record. The result was that not only were the rulings of the court accurately and concisely expressed in the head-notes, but the tables of cases, statutes, text, and indexes were complete and accurate in every detail. As a consequence of such thorough and accurate reporting, all one has to do to ascertain a point decided is to consult the head-notes. They can be depended upon to state the decision correctly. Only when an examination of the argument or grounds of the decision is desired is it necessary to have recourse to the opinion. This saves valuable time in the ascertainment of the law, and gives to the Wisconsin Reports an added value. Many a terse, accurate head-note has given increased vitality and usefulness to the opinion.

It was my good fortune to know Mr. CONOVER quite intimately for a long period of time. The qualities of his mind that impressed me most were his keen sense of justice, his hatred of all shams, his high ideals in art and literature, and his reluctance to display the rich stores of his garnered knowledge. Only in rare moments of privacy would he disclose the treasures of his mind and then in a casual rather than a didactic manner, though it was easily observable that the touchstone of his keen judgment had been applied to the contents of all his reading, and that they had been given a careful and just appraisal.

The summary of Mr. CONOVER'S civic and social qualities contained in the memorial of the bar is heartily indorsed, and it is with a deep sense of personal as well as official loss that we record his death and order the memorial printed and preserved in the Reports to which his long-continued and excellent services have given such enhanced value.

WILLIAM J. TURNER.

On the 25th day of June, 1919, Mr. Jackson B. Kemper of Milwaukee presented the following.

Memorial of the Milwaukee County Bar Association.

May it please the Court:—WILLIAM J. TURNER was born at Waukesha, Wisconsin, on the 13th of September, 1848. He was the son of Harvey Griswold Turner, one of the pioneer lawyers of this state.

WILLIAM J. TURNER was educated in the public schools of Waukesha and of New York city, where his parents moved in the year 1861. They returned to Wisconsin in 1863, and WILLIAM J. TURNER received his academic education in Carroll College, Waukesha, and Beloit College, Beloit. He entered the University of Albany, New York, in 1869, and was graduated as a member of the class of 1871 with the degree of bachelor of laws.

After his graduation WILLIAM J. TURNER returned to Wisconsin and practiced for about a year at Port Washington, but in 1872 he removed to Manitowoc, where he remained for some ten years. He came from Manitowoc to Milwaukee in the year 1882, where he first formed a partnership with the late Leander F. Frisby. In 1887 he entered into partnership, under the name of Turner & Timlin, with William H. Timlin, late Justice of this court. This partnership lasted until 1893, and thereafter for three years Mr. TURNER was a member of the firm of Turner, Bloodgood & Kemper. In 1896, in conjunction with his nephew, he organized the firm of Turner, Pease & Turner, and still later formed the firm of Turner, Hunter & Goff, which partnership lasted until 1908, when Mr. TURNER was elected one of the judges of the Second judicial circuit, a position which he held until his death in 1919, being re-elected by substantial majorities at the expiration of each term.

In early life Judge TURNER was district attorney of Manitowoc county for one term. He was a member of the Milwaukee school board from 1889 to 1893 and was president of the board for one year. He was elected in 1896 a member of the board of school commissioners, whose duty it was to appoint the school directors for the city of Milwaukee, and was president of this board and served for a term of four years. He was at one time a candidate for Justice of the Supreme Court of Wisconsin and, although defeated, received a large and substantial vote, showing the esteem in which he was held by citizens of the state at large.

Judge TURNER was married twice, first to Miss Alice B. Morgan, and after her death to Mrs. Seville DeGarmo. He is survived by one son, Leland M. Turner, by his first marriage, and by his widow.

Judge TURNER was a communicant of the Protestant Episcopal church, and during all of the time that he lived in Milwaukee was a member of St. James parish in that city. He was one of its vestry-

men or wardens continuously from 1885 to the time of his death. He was a prominent Mason; was a member of La Fayette Lodge, Calumet Chapter, and Ivanhoe Commandery Knights Templar, and also a member of the Wisconsin Consistory.

Judge TURNER held a high and enviable position at the bar. He was particularly distinguished as a trial lawyer of singular ability and success; he made no pretensions to oratory, but he had a singularly clear and winning way of presenting the facts in his case which was very convincing both to courts and juries; he was always courteous and fair to his opponents and to his associates, and on account of these qualities, as well as his great success in winning causes, his services as counsel were greatly sought, by younger members of the bar particularly; he was always ready to help a young lawyer out, and also to give him his full share of credit for whatever he might have accomplished.

Judge TURNER brought to the bench the same qualities of courtesy and fairness which had distinguished him at the bar; he was industrious, painstaking, and fair-minded, and was respected by all who had occasion to enter his court room.

Judge TURNER's death was a great loss to the bench, to the city, and to the state. The bar of Milwaukee county, in these few and inadequate words, beg leave to express in some degree their appreciation of Judge TURNER's character and virtues and to record their personal sense of the loss which each and every member of the bar of his own county feels in Judge TURNER's death.

Mr. Justice ROSENBERRY responded on behalf of the court:

The bench and bar are again called upon to pay tribute to one who exemplified in his life the work, the practices, and the ideals of a former generation and who was in the best sense of that term a lawyer of the old school. For nearly a third of a century Judge TURNER had a commanding place at the bar. He was called to many positions of public trust, all of which he filled with credit to himself and to the lasting advantage of those whom he served. As district attorney, as a member of the school board of the city of Milwaukee, and as a member of its board of school commissioners, as well as lawyer and judge, he gave largely of his time, energy, and ability in the public interest.

Judge TURNER won his highest honors as a trial lawyer. It is the fate of the trial lawyer to leave little behind him as a monument of his successes. The service which he renders is peculiarly ephemeral. The distinguishing part which he plays in the trial of cases and in the determination of issues can rarely be made a part of a permanent record. The strategy and generalship of forensic contests, together with the ability to form and carry out plans in the

trial of cases, are matters which do not become a part of the record. Judge TURNER was singularly successful in this field. His attractive and magnetic personality, his courtesy and fairness to his opponents and to the court, won him the confidence of every one connected with the trial of a case. While he was not a student in the sense in which that term is generally used, he was nevertheless an able lawyer, a man of great resourcefulness, adroitness, and ingenuity. Of him it can be truly said that he was a man who learned by living.

I quote from a tribute paid him by a lifelong friend and associate, Hon. L. J. Nash:

"Mr. TURNER had that rare quality, perhaps I should say that rarest of all qualities, which enables one to grow continuously from youth to old age. With added years he used books more and more, although he never became bookish, nor even learned in the book sense. But whatever he saw or heard in the hundreds of cases he tried was stored away ready to be drawn upon whenever occasion required it. This capacity for growth included also all the requisites of a full and well-rounded manhood. He was a very much better man and lawyer in every way at fifty than at twenty-five, and a still better man and lawyer at seventy than at fifty.

"No lawyer of my acquaintance had tried as many cases as Mr. TURNER had tried before he went upon the bench. His experience had repeatedly brought him face to face with every point of practice. He knew the pathway of actions and proceedings as a boy knows the pathway to school. Very seldom indeed is a circuit court judge as well equipped with so complete an outfit for deciding cases of practice. On the bench he was always dignified, always patient, a good listener and a good thinker at the same time. He was quick to interfere if counsel on either side was conducting an examination that did not give the witness a fair chance to tell the whole truth. No circuit judge that I have ever seen was quicker to check the improprieties of counsel or to restrain the conduct of counsel which in any way tended to act as a stumbling block in the pathway of justice.

"As a companion, a friend, a neighbor, and a citizen his life was in every way creditable. Few men were freer from little or great faults. His influence was always on the right side of public questions. He was a devoted member of the Episcopal church. He came to the end of a long and useful life with great fortitude. I saw him but a few days before his death. He was cheerful and happy, although he then knew the end could not be far off."

We fully and heartily concur in this tribute from one who had known him as neighbor, lawyer, and judge throughout his entire career, a tribute which for that reason carries with it much greater weight than anything which might be said by one who had not so known him.

The memorial offered by the bar will be received and made a part of the records of this court.

CASES DETERMINED

AT THE

January Term, 1919.

DAHINDEN, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

March 4—April 2, 1919.

Street railways: Collision with automobile: Contributory negligence of driver: Question for jury.

As plaintiff, driving an automobile in the city of Milwaukee, approached a cross street on which were defendant's street railway tracks his view to the south was obstructed until he was about twenty-five feet from the north-bound track. He was then running from five to eight miles per hour. Looking south he saw a street car approaching about 175 feet away, decided he could cross safely in front of it, and shifted his gears accordingly. He did not look again in the two seconds within which his automobile reached the track. The car, running twenty-five miles per hour, struck his rear wheel. *Held,* that the question of his contributory negligence was one for the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

This action was commenced in the civil court of Milwaukee county. At the conclusion of the trial a verdict was directed in favor of defendant on the ground that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff appealed to the circuit court for Milwaukee county, where the judgment was affirmed. From the judgment of affirmance plaintiff appeals.

The evidence disclosed that in the morning of the 2d day of March, 1917, plaintiff was driving an Apperson automo-

bile west on Chestnut street in the city of Milwaukee, which street is intersected by Twenty-seventh street, upon which are the street railway tracks of the defendant. He approached Twenty-seventh street at about fifteen miles an hour. A car barn on the southeast corner of the intersection, about twenty-five and one-half feet distant from the track, prevented his view southward on Twenty-seventh street until he had cleared the car barn. The automobile was about thirteen feet from end to end. He slowed down so that as he cleared the street-car barn he was running from five to eight miles per hour. At this point he saw a street car approaching from the south about 175 feet distant. Considering that he had ample time to cross the track ahead of the street car, he shifted gears into intermediate and proceeded. He did not again look in the direction from which the street car was coming until he had entered upon the track, when he heard the gong violently sounding and discovered the street car rapidly approaching about twenty feet distant. He exerted every effort to cross ahead of the street car, but failed to clear the overhang of the street car by about three inches, and the left rear wheel of his automobile was struck by the street car, inflicting damage.

The evidence also showed that the street car was under the control and management of a student motorman and that it was running about twenty-five miles an hour. After the collision it ran a distance of 110 feet before it was brought to a stop.

For the appellant there was a brief by *Martin J. Brennan,* attorney, and *Walter Gold,* of counsel, both of Milkee, and oral argument by *Mr. Brennan.*

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Ralph M. Hoyt,* all of Milwaukee.

OWEN, J. The plaintiff could not obtain a view of the street-car track until he had cleared the car barn, about

twenty-five feet distant from the track. The front end of his car was at least five feet, and probably eight feet, closer to the track, leaving it a distance of from seventeen to twenty feet from the track. He testified that when going at the rate of five miles per hour he could stop his car within a distance of three feet. Assuming that he was going at the rate of five miles an hour he would cover fourteen feet in two seconds. The last possible opportunity, therefore, for him to look before entering the zone of danger was within two seconds after he did look and concluded that he had ample time to cross the track, during which time he shifted gears.

As we understand the opinion of the trial court, he held the plaintiff guilty of contributory negligence as a matter of law because of his failure to look again, and the question presented is whether the court was correct in that view of the case.

Negligence consists in a want of that care and prudence that the great mass of mankind exercises under the same or similar circumstances. Unless such want of care is so clear and conclusive as not to admit reasonably of any opposing inference in unbiased and unprejudiced minds, the proper inference to be drawn must be determined by the jury. *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573.

The duty to look and listen enjoined upon those about to cross a steam railway track also devolves upon those about to cross a street railway track, but as to the latter the doctrine is somewhat less rigorously applied. This court has recognized a distinction between a steam and a street railway in this respect, which distinction is pointed out in *Grimm v. Milwaukee E. R. & L. Co.* 138 Wis. 44, 119 N. W. 833. Attention is there called to the fact that cars are run on street railway lines, especially in the city of Milwaukee, at certain periods of the day, with great frequency; that they make numerous stops and do not attain that high velocity that is acquired on steam roads; that they are more

easily controlled and can be more quickly stopped; that they are run on public streets where pedestrians and other vehicles enjoy equal rights, and not upon a private right of way which but occasionally intersects a highway. In that case it was said, quoting from *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 84 N. W. 823, that:

"A person desiring to cross a street-car track in advance of an approaching car has the right of way if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car to and past the point of crossing, assuming that it is moving at a reasonable and lawful rate of speed. If a person, exercising his judgment as indicated, attempts to cross the track, and it turns out that he has miscalculated, he cannot be held guilty of a breach of duty to exercise ordinary care. If in the circumstances stated, other than the speed of the car, the car is approaching at an unlawful rate of speed, and it is observable by the person about to cross the track, by the exercise of ordinary care, he must take that into consideration in determining whether there is time to safely clear the track; the duty to exercise ordinary care for his own protection not being excused by the fault of anybody else."

In that case the driver of a laundry sleigh standing at the curb, as he stepped to the seat of the sleigh from the curb, looked to the north, saw a street car approaching, which he estimated at 900 feet distant, and calculated that he had plenty of time to cross the track ahead of the car, immediately turned his horse and drove into the pathway of the approaching car without again looking. But before the turn was completed so that the sleigh would clear the passing car a collision occurred.

In holding that under such circumstances the driver was not guilty of contributory negligence as matter of law the court said:

"A court cannot say, as a matter of law, that persons of ordinary care using the streets of the city of Milwaukee do

not observe the distance cars are from the crossings and the probable rate of speed at which they are proceeding and do not calculate whether there is sufficient time to cross the tracks in advance of the car. If they did not do so, and waited until all cars were out of sight, they might find it difficult to cross at all." *Grimm v. Milwaukee E. R. & L. Co.* 138 Wis. 44, 52, 119 N. W. 833.

We think the doctrine of that case is applicable here. It is apparent that the plaintiff as he approached the corner was proceeding with due care. This is indicated by the fact that he slowed down to a speed of from five to eight miles per hour. As he passed the street-car barns he looked at the first opportunity and saw the street car about 175 feet distant. He had much experience in driving cars in the city of Milwaukee, and from this experience he estimated that he had ample time to cross the track ahead of the street car. In this he was not mistaken but for the fact that the street car was coming at an abnormal rate of speed, and even under those circumstances he lacked but three inches of clearing ahead of the car.

It would be a most rigorous application of the look-and-listen rule to hold that plaintiff was guilty of negligence as matter of law because, after having looked and deciding that he had time to cross ahead of the car, he did not look again within the space of two seconds, which was his last moment of opportunity before entering the danger zone, and this, especially, in view of the fact that during such time his attention was somewhat devoted to a shifting of gears.

In this connection it should be borne in mind that the view which he obtained of the approaching car was approximately a head-end view and not one which would readily enable him to discover the fact that the car was approaching at a high rate of speed.

We think it would be assuming overmuch to say plaintiff was guilty of negligence as matter of law. The question of whether he exercised such care and prudence as the ma-

jority of mankind exercise under the same or similar circumstances was a question for the jury.

It follows that the trial court erred in directing the verdict, that the circuit court erred in affirming the judgment, and that the judgment should be reversed.

By the Court.—Judgment reversed, and the cause remanded for further proceedings according to law.

KERWIN and ROSENBERRY, JJ., took no part.

SCHEIDERER, Appellant, vs. A. GEORGE SCHULZ COMPANY, Respondent.

March 4—April 2, 1919.

Milwaukee civil court: Appeal: Reversal in circuit court: Judgment, where to be entered: Master and servant: Injury to minor employee: Safety of working place: Contributory negligence: Action by parent: Former action by minor: Res judicata: Stare decisis: Parties: Guardian ad litem.

1. Where, on appeal, the circuit court reverses a judgment of the Milwaukee civil court without granting a new trial, the proper judgment should, under sub. 5, sec. 28, ch. 549, Laws 1909, be entered in the circuit court and the costs taxed and inserted therein by the clerk of the circuit court.
2. An order of the circuit court, in such a case, reversing the judgment of the civil court and remanding the cause to the civil court for the entry there of judgment with costs, will be treated, on an appeal therefrom, as a judgment of the circuit court.
3. In an action by a parent to recover for injuries to her minor son whose fingers were cut off by the knives of a machine operated by him in defendant's factory to cut the corners from card-board squares, the evidence—showing, among other things, that he was familiar with the machine and fully aware of the dangers incident to its operation—is *held* to have warranted the circuit court in holding, contrary to the jury's finding in the civil court, that in using his fingers to clean out the slots under the knives, without blocking the treadle of the machine, the boy was guilty of contributory negligence which precluded a recovery.

4. A judgment dismissing a former action by the son in which he appeared by his mother as his guardian *ad litem* and in which the jury found him guilty of contributory negligence, was not binding, under the doctrine of *res judicata,* in the action by the mother; nor could the verdict in such former action be held to operate as an estoppel, on the principle of *stare decisis,* where the evidence in that action was not before the court in the later action.
5. Where, either as a plaintiff or a defendant, an infant appears by a guardian *ad litem* appointed by the court, the infant, not the guardian *ad litem,* is the party to the action.

APPEAL from an order of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

The appeal is from an order reversing a judgment of the civil court in plaintiff's favor and dismissing the action. The action was brought by the plaintiff to recover damages she sustained through the injuries suffered by her minor son while in the employ of the defendant.

The defendant operates a box factory in the city of Milwaukee. In January, 1913, Clarence Scheiderer, plaintiff's son, a boy sixteen years of age, was employed in the scoring room of the defendant's factory. The machine at which he was working was known as a corner-cutting machine, which cuts the corners from card-board squares. This machine stands upright and is about four feet in height, having a flat horizontal surface in which there were two slots, into which knives attached to a post above the flat surface moved up and down so as to cut the corners from papers which were laid upon the surface of the table over the slots. The knives were operated by a treadle near the floor at the right-hand side of the machine. The operator used his foot in working this treadle. When he stepped on it the knives would descend through the slots, and when he removed the pressure of his foot they would return to their original position above the table. A piece of tin, attached to the floor, extended underneath and out from the front of the machine and extended in part over the place where the

operator stood. A stick of wood was attached to one end of the treadle, and the other end lay loose upon the floor.

According to the complaint of the plaintiff, on January 10, 1913, the machine at which Clarence Scheiderer was working became clogged. While removing the clogged paper from the slots he came in contact with the stick attached to the treadle, causing the knives to come down and amputate four of his fingers at the knuckles. The plaintiff alleges negligence on the part of the defendant in that the tin under the machine was allowed to become oily and greasy, making the operator's footing insecure and unsafe. She also alleges that the defendant was negligent in failing to adopt and use appliances to remove clogged paper from the machine; that the work required of Clarence Scheiderer at the time of his injury was greater than his strength could endure; that he was not supplied with adequate helpers or assistants and was not warned of the dangers of his employment and the operation of the machine.

The answer of the defendant denies that the machine was defective and unsafe. As a separate defense is pleaded the action of the circuit court of Milwaukee county, wherein Clarence Scheiderer is plaintiff and against this defendant, in which judgment was rendered against the plaintiff in favor of the defendant and action dismissed upon the finding of the jury that the plaintiff was guilty of contributory negligence.

In the special verdict the civil court in this action found that the defendant permitted Clarence Scheiderer to be in a place of employment which was not as safe as the nature of the employment would reasonably permit; that this fact was the proximate cause of the injury to Clarence Scheiderer; that the defendant failed to adopt and use methods for the conduct of its business which were adequate to render the employment of Clarence Scheiderer as safe as the nature of the employment would reasonably permit; that such failure was the proximate cause of the injury to Clarence Scheid-

erer; that the failure of the defendant to warn Clarence Scheiderer of the dangers of his employment was a proximate cause of his injury; that Clarence Scheiderer slipped on the oil or grease upon the piece of tin in front of his machine, thereby causing the injury; that he pursued the customary method and process of removing the cardboard from the slots when he did not first adjust a block under the treadle; and that he was not guilty of want of ordinary care contributing to cause his injury.

Judgment was entered awarding the plaintiff $1,325.24 damages and costs. The circuit court, upon review of the case, dismissed the complaint upon the merits and ordered that the cause be remanded to the civil court and that the clerk of the civil court enter judgment in favor of the defendant and against the plaintiff, with costs. This is an appeal from such order.

Henry W. Stark of Milwaukee, for the appellant.

For the respondent there was a brief by *Doe, Ballhorn & Walker* of Milwaukee, and oral argument by *Joseph B. Doe.*

SIEBECKER, J. The record shows that the circuit court entered an order reversing the judgment of the civil court, and ordered that the cause be remanded to the civil court with directions that judgment be there entered dismissing the plaintiff's complaint, with costs. This order of the circuit court, made pursuant to the civil court act (ch. 549, Laws 1909, as amended; secs. 1275–1337, Milwaukee County Laws, 1912), is in effect a judgment of the circuit court and we must so regard it. It is clear that secs. 1334–1337 inclusive (sub. 2–5, sec. 28, ch. 549, Laws 1909, as amended by ch. 320, Laws 1913), prescribing the proceedings on appeal in actions from the civil court to the circuit, provide that on appeal from a judgment the circuit court is required to affirm, reverse, or modify and affirm as modified, the judgment appealed from upon the original papers

and the return of the clerk of the civil court. Sec. 1337 (sub. 5, sec. 28, ch. 549, Laws 1909) provides that if a civil court judgment is affirmed, or affirmed as modified, it shall be entered and docketed in the circuit court as if originally rendered therein and thereby become a judgment of the circuit court. No specific direction is provided as to what proceeding shall be had if the judgment appealed from is reversed when no new trial is granted. The following clause in sec. 1337 (sub. 5, sec. 28, ch. 549, Laws 1909) is controlling in such cases:

"The proceedings upon any appeal from any judgment or order of the civil court, except as herein otherwise provided, shall be governed by the provisions of chapter 160 of the Statutes relating to appeals from justices' courts and judgments of justices of the peace so far as such provisions may be applicable thereto."

Under these provisions the circuit court was authorized to reverse the judgment appealed from and enter judgment dismissing the complaint and award defendant recovery of the costs to which it is entitled under the statute in the civil and circuit courts, and in order to perfect the judgment the clerk of the circuit court should have been directed to tax such costs and insert them in the circuit court judgment.

The circuit court held that the jury's finding that Clarence Scheiderer was not guilty of any want of ordinary care proximately contributing to cause the accident is without support in the evidence. The circuit court set forth and collected the evidence on the subject in an elaborate opinion which would unduly extend the report of the case if given in detail here. Reference thereto clearly shows that Clarence Scheiderer was familiar with the machine and all its surroundings; that he had had explained to him the method of operating the treadle, the use of the button under the treadle to prevent the machine from operating, and the danger to his hands if put under the knives if the machine should be accidentally started by coming in contact with the treadle or

the attached stick; that he was supplied with an iron hook to clean the slots when they became clogged; and that he observed other operators use their fingers to clean out the slots. Among the facts he testifies to are these:

". . . Before my knee slipped off the rod I knew that the button was not under the treadle. . . . I didn't think of it until I got down on the floor, and when I got down on the floor I first thought of the treadle or the block. . . . I knew in the position my hand was it would cut my fingers."

It is manifest from this testimony that he was fully aware of the dangers incident to operating the machine under the methods and processes that the work was being done; that he failed to exercise ordinary care to use the appliances and the methods to protect himself from the hazards incident to and known to him in operating the machine, and that such want of care on his part contributed to produce the accident. It necessarily follows that plaintiff is not entitled to recover on her complaint.

It is contended that the circuit court erred in holding that the judgment rendered in the action of Clarence Scheiderer by his guardian *ad litem, Caroline Scheiderer,* the plaintiff herein, and against this defendant, is not *res adjudicata* in this action. It is clear that *Caroline Scheiderer,* this plaintiff, was only technically a party to the former action. A guardian *ad litem* in an action is appointed by the court and answerable to the court. The infant is the party. "The fact that he appears by guardian *ad litem* does not make two parties plaintiff [or defendant]. Failure to appoint a guardian *ad litem* for a minor does not throw him out of court." *Rohleder v. Wright,* 162 Wis. 580, 156 N. W. 955. Nor was the plaintiff in any sense the real party in interest to that action; she had no interest in or right to the son's cause of action or the judgment he might obtain. Her relationship to the son's cause of action and any judgment therein was that of a stranger. She had no interest or property right therein, nor did she in any way

succeed to any of the son's rights. Under such conditions no grounds for the application of the principle of *res adjudicata* exist as claimed by defendant. Upon the point made by the defendant that the verdict in the son's action operates as an estoppel because the jury there found him guilty of contributory negligence upon the principle of *stare decisis,* it is sufficient to say that the evidence in the former suit is not before the court and hence it cannot be known on what the verdict in that case rested nor whether the evidence on the issue of contributory negligence is identical in the two actions. We have above indicated that the order of the circuit court from which this appeal is taken is in effect a judgment.

By the Court.—The judgment is affirmed.

KERWIN and ROSENBERRY, JJ., took no part.

GRIEBENOW, Respondent, vs. CHICAGO & MILWAUKEE ELECTRIC RAILWAY COMPANY, Appellant.

March 4—April 2, 1919.

Street railways: Injury to passenger falling from platform: Negligence of conductor: Evidence: Question for jury.

1. Evidence showing or tending to show that an adult passenger on a street car, in full possession of his faculties and familiar with the streets over which the car was passing, got up from his seat when the car—which was then running at a high but not unusual rate of speed and was swaying from side to side—was less than a block from his destination, and, the conductor having opened the door for him to pass, went out upon the rear platform, from which almost immediately he fell and was injured, is *held* not to sustain a finding by the jury that the conductor failed to exercise ordinary care in so opening the door,—there having been nothing in the passenger's appearance to indicate that special care should be exercised in his behalf.
2. No sudden jar or sway of the car after the door was opened and the passenger stepped out could be taken into account in

determining the conductor's negligence, in the absence of any showing that the roadbed just beyond was, to his knowledge, out of repair or uneven.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Reversed.*

Action begun in the civil court of Milwaukee county to recover damages for personal injuries sustained while plaintiff was a passenger on one of defendant's cars. He boarded the car at about 6 o'clock in the afternoon on or about April 14, 1915, in company with two of his fellow workmen, and told the conductor that he wanted to get off at Lincoln avenue. Plaintiff was about sixty-nine years of age and had ridden on the car line ever since it was built and was familiar with the streets over which the car passed. After it had crossed Grant street, going south, Lincoln avenue being one block beyond, he got up from near the front end of the car where he had been sitting and with his pipe in his hand walked towards the rear of the car. The conductor, who was standing near the door, opened it for him and he stepped out on the platform, and just as he did so he claims he fell from the car to the street and was injured. He was picked up about 150 or 200 feet north of Lincoln avenue. The block between Grant street and Lincoln avenue is estimated to be about 300 feet in length. There was evidence that the car was running at a high rate of speed and was swaying from side to side at and just prior to the accident.

The jury by a special verdict found (1) that defendant's car was proceeding at a high rate of speed and was swaying from side to side just prior to the injury; (2) that the conductor failed to exercise ordinary care in opening the door for the plaintiff to permit him to step down upon the rear platform; (3) that such failure to exercise ordinary care on the part of the conductor was the proximate cause of the injury; (4) that no want of ordinary care on the part of the plaintiff proximately contributed to his injury; (5) that he

did not fail to exercise ordinary care in proceeding to the rear platform before the car came to a state of rest; and (6) that he sustained damages in the sum of $500. Judgment upon the special verdict was awarded plaintiff in the civil court, and upon appeal to the circuit court the judgment was affirmed, and the defendant appealed to this court.

For the appellant there was a brief by *Edgar L. Wood* of Milwaukee, attorney, and *A. L. Gardner* of Chicago, of counsel, and oral argument by *Mr. Wood.*

For the respondent there was a brief by *Morris Stern,* attorney, and *A. W. Richter,* of counsel, both of Milwaukee, and oral argument by *Mr. Richter.*

VINJE, J. The special verdict covered the issues litigated upon the trial, and it will be observed that the only negligence found on the part of the defendant consisted in the conductor's opening the door to permit the plaintiff to pass out on the rear platform. It was the usual rear platform of a large city car, divided by upright and horizontal iron rods into one space for exit and one for entrance, with handholds at the sides of each besides the dividing rods. Its floor was from six to eight inches lower than the floor of the car. The question at issue is, Was the car running at such a high rate of speed or swaying so much that it was negligence on the part of the conductor to open the door for plaintiff and permit him to go out on the platform? It so happened that at the time of the accident there were only four passengers on the car—plaintiff and his two fellow workmen, Mlynarek and Odee, and one Stodola. The whereabouts of the motorman was unknown at the time of the trial, so we have only the testimony of the four passengers and of the conductor. Plaintiff testified that when he went down the aisle the car swayed so that he took hold of the corner handles of the seats to steady himself; that it was going at the same rate of speed it does when it has no stops to make and swayed such a sway as it makes when it goes fast—the usual sway

a car makes when it goes fast; that he had not seen the same sway before—it was shaking like the dickens, and the jar that threw him from the platform "was stronger—awfully stronger than those before." Mlynarek testified that the car was going at full speed; that the whole control was open and the car swayed; that it swayed five blocks back; that it ran as it usually does when it has no stops to make, and that the last sway was just as strong as those that went before. Odee testified that the car was running at full speed; that it gave a sway just as plaintiff stepped upon the platform, and that it gave the same sway as it always does when it goes at full speed. Stodola testified on behalf of the defendant that he noticed no unusual motion of the car before plaintiff fell off and that the car had begun to slow up before plaintiff fell and that he was picked up nearer Lincoln avenue than Grant street. Rankin, the conductor, testified that Lincoln avenue was a fire-department crossing and that the car always crossed it slowly; that the plaintiff was standing on the step below the platform when he fell and that the car was then running slowly. Such is the substance of the evidence. Considered most favorably for plaintiff it shows that the car was running at a high rate of speed and swaying from side to side. But there is nothing to indicate that an unusual or extraordinary condition obtained. Plaintiff's statement that it shook like the dickens may, for aught that appears in evidence, refer to the much stronger or awfully stronger jar he says that threw him from the car. When it is considered that the car was to come to a stop at Lincoln avenue to permit plaintiff to alight and that each of the plaintiff's witnesses, when asked to compare its actions with that of cars generally when they ran fast or with their usual speed in the middle of a block, testified that it acted as such cars act when so running, it is not likely that there was anything very unusual in its speed or swaying. There is not a syllable of evidence that the roadbed or car was out of repair. We have, therefore, the situation of an ordinary city street car running at a

high rate of speed in the middle of a block and swaying from side to side as such cars usually do when they run fast. Is it negligence under such circumstances for the carrier to permit an adult passenger in full possession of his faculties to go out upon the rear platform? Negligence is a failure to exercise that degree of care that the mass of mankind usually exercise in a like or similar situation. Now it is a matter of common knowledge that a great many of the adult street-car traveling public leave their seats and proceed to the platform preparatory to alighting before the car comes to a stop and often while it is in rapid motion. Frequently, when travel is congested, passengers ride upon the platform, not from choice, it may be, but from necessity. Some ride there from choice at times, especially those who wish to smoke. This shows that the mass of mankind do not consider the platform as necessarily an unsafe place to stand on a moving car. That conditions may exist making it a dangerous place cannot be denied. It is therefore generally a question of fact for the jury to determine whether or not a person voluntarily riding upon a street-car platform is guilty of contributory negligence. *Engen v. Chippewa Valley R., L. & P. Co.* 162 Wis. 515, 156 N. W. 460; *Bassett v. Milwaukee N. R. Co., post,* p. 152, 170 N. W. 944. It is true the jury must have considered the platform an unsafe place in this case or they could not have found the conductor negligent in permitting plaintiff to go upon it. But we are satisfied the evidence does not support the finding. In the summer time the doors are often open, allowing passengers free access to the platform at all times. And even if the doors are shut it is not an indication that passengers are not to go upon it. The conductor, no doubt as a matter of courtesy, opened the door for plaintiff; *non constat* plaintiff would not have opened it himself with the same result. He was headed for the platform and presumably would have reached it unaided. There was nothing in the speed or motion of the car that called upon the conductor to keep plaintiff inside. Any

sudden jar or sway in the car after the door was opened and plaintiff stepped out could not be taken into account in determining the conductor's negligence, in the absence of any showing that the roadbed just beyond was, to the knowledge of the conductor, out of repair or uneven. In the conduct of a street-car business it is practically necessary that the adult traveling public have free access to the platform under circumstances similar to the one at bar. Passengers must find seats upon entering while the car is in motion, and they generally prepare to alight before the car comes to a full stop. Any other method in conducting the business would render it too slow for the busy American public. Regard must always be had to the usual and reasonable method of conducting a business when applying the touchstone of negligence to any one engaged in it.

The fact that plaintiff was sixty-nine years old and had one useless and one good eye cannot take him out of the class of the average adult. The evidence showed that he had been riding over the line for years, that he was a hard-working man, in good health, and had worked for the same company for fifty-two years. There was evidently nothing in his appearance to make it incumbent upon the conductor to exercise any special care in his behalf. It is to be regretted that he fell and was hurt, but the cause therefor cannot be laid at the door of the defendant.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the action upon the merits.

KERWIN and ROSENBERRY, JJ., took no part.

HICKMAN, Respondent, vs. WELLAUER and others, Appellants.

March 4—April 2, 1919.

Adjoining lotowners: Lateral support of building: Municipal ordinances: Assumption of obligation to support: Injury to building: Damages.

1. A lotowner has an absolute right, so far as his land is in its natural condition, to lateral support from the adjoining lot.
2. If a lotowner has added to the weight of the soil by the erection of a building, he must himself provide proper support and care for such additional load whenever the owner of the adjoining lot wishes to excavate thereon; but reasonable notice of the intention to excavate on such adjoining lot so near the building that danger thereto might reasonably be anticipated must be given to the owner of the building so that he may have an opportunity to protect and support it.
3. The established property rights above mentioned cannot be taken away or substantially changed except by express declaration of the legislature, either by statute or by express delegation of such a power to a city council. They were not, in this case, affected by a municipal ordinance (adopted under the general authority given by the city charter to the common council "to control and regulate the construction of buildings," etc.) providing that "no one shall excavate so as to injure any adjoining ground or building."
4. Without having given any notice, the owner of an adjoining lot began excavating near and beneath the foundation of plaintiff's building, and, assuming that under the ordinance above quoted he was bound to support the building, he began underpinning said foundation with concrete. Plaintiff obtained a temporary injunction, but a motion to vacate it was at once made. Pending such motion the work was continued and a large part of it had been completed when, some days later, the injunction was vacated and modified so as to permit the removal of earth and supports from and under the building under the direction and advice of competent and capable engineers and with the approval and consent of the building inspector of the city; a bond being required and given for payment of any judgment plaintiff might recover in the action. The method used in the undermining and underpinning of plaintiff's building was not the usual and proper one, but was adopted because of its supposed convenience and economy; and the work caused the building to list, cracking

and injuring it. *Held,* that under the circumstances there was more than a gratuitous performance by defendant of plaintiff's obligation to support his own building, and that there had arisen an obligation on defendant's part to prosecute the work by proper methods and with reasonable skill and care and a liability for damages caused by a breach of such obligation.

5. The diminution in the value of the building was the proper measure of plaintiff's damages; and defendant was not entitled to any allowance for the expense of doing the work.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

The plaintiff owned a lot twenty by ninety feet facing west on Edison avenue in the city of Milwaukee upon which was a three-story-and-basement brick building twenty by eighty-six feet, the north wall of which was just on the line between plaintiff's lot and one belonging to former defendant Jacob Wellauer. Prior to 1890 a two-story brick barn twenty by twenty-five feet stood there on a foundation eight to ten feet high of rubble stone about twenty-two inches thick. In 1891 it was changed into a dwelling, with fifteen-foot additions front and rear, and in 1893 a third story was added.

Wellauer proposed to erect a building on his lot, the foundations of which were to be along the division line between the two and the base of which was to be eight or nine feet lower than the base of the foundation wall on plaintiff's lot. Wellauer let the contract for excavating to one Wussow, who placed his steam excavator upon the lot on the afternoon of September 21, 1915. On the same afternoon the building inspector of Milwaukee, together with the defendant *Hartman,* general contractor for Wellauer, and the architect, were on the premises and examined the same with reference to what should be done with plaintiff's building. It appears that it was tacitly assumed at that time that by virtue of the ordinance hereinafter quoted the obligation was upon a person excavating as Wellauer proposed to do, to support and protect any adjoining building from damages consequent upon excavating. The methods for so doing

were discussed, and then the defendant *Hartman* commenced on September 22d to excavate under the north foundation of plaintiff's building to a depth of eight to nine feet below the base of such foundation and in sections from four to eight feet long at a time, removing the earth in such sections from plaintiff's lot and then building up in such sections with stone and cement mixture to the bottom of plaintiff's foundation wall and for the entire width thereof, and after each such section had been completed making another section, and so on until the entire space occupied by plaintiff's foundation on the north line had been so built up. Such work or underpinning was completed about October 3d or 4th.

On September 24th plaintiff learned that such underpinning had been undertaken and on the next day commenced this action, the particulars of which and the subsequent proceedings therein are set out in the opinion. His complaint alleged the existence of the ordinance hereinafter quoted, the digging and removing of dirt from the Wellauer lot and from below and beneath the north wall of plaintiff's building, and that the stability of his building was impaired by failure to properly protect and guard the foundation wall. An amended complaint also alleged failure by defendants to give plaintiff notice of the proposed excavation so that he might properly protect said building.

During the progress of such underpinning by defendants it appeared that plaintiff's building was continually listing to the north, and on September 27th the building inspector issued an order on the architects requiring them to underpin and make safe the northeast corner of plaintiff's building forthwith in like manner as other parts of the building had been done by them so as to protect from any action which might result from the elements. Subsequent to such notice a diagonal bracing was placed at the northwest corner of plaintiff's building, starting from a point some distance north on the Wellauer lot to about the second floor of plaintiff's

building, and another brace was run from the northeast corner of the building to a building situated in the rear of the Wellauer lot.

Upon the trial, which was by the court without a jury, the court found substantially as follows: (1) Plaintiff's building was plumb at the time the defendants commenced excavating; (2) that it was in a good and ordinary state of repair; (3) that there was then a good bearing foundation in the wall under plaintiff's building; (4) that the excavations done by defendants prior to the underpinning caused plaintiff's building to list; (5) that the method adopted by defendants was inadequate and not careful; (6) that it was not such as is generally used under such foundations; (7) that the use of so-called needle beams or diagonal braces would have prevented injury to plaintiff's building; (8) that there was a violation by defendants of sec. 43 of the Milwaukee city building code; (9) that the acts of the defendants caused plaintiff's building to list to the north, cracking and injuring it; (10) that the failure to support and straighten the north wall of plaintiff's building caused the same to project at the upper part some two and one-half inches over and above the Wellauer lot; (11) that the damages to plaintiff's building by reason of the foregoing were $3,400, and that in addition to such compensation he was entitled to have an easement on the Wellauer lot to the extent that the north wall then projected over to such lot so long as plaintiff's building stood.

The court further found that the top of plaintiff's building north projects over on to the Wellauer lot two and one-half inches at the east end and four and one-half inches at the west end and that there were the following slants to the floors: in the basement five inches, first floor five to seven and one-half inches, second floor four and one-half inches to almost eight inches, and on the third floor five to five and three-fourths inches, and that about 105 cubic yards of dirt had been removed from plaintiff's lot under the foundation.

During the litigation Jacob Wellauer died and the action

was revived as to his executors, who with the principal contractor, *Hartman,* are now defendants herein.

From judgment entered in accordance with such findings the defendants have appealed.

For the appellants there were briefs by *Hoyt & Goff* of Milwaukee, and oral argument by *Frank M. Hoyt.*

For the respondent there was a brief signed by *Herbert J. Piper* of Milwaukee, of counsel, and oral argument by *Mr. Piper.*

ESCHWEILER, J. The appellants contend: (1) that the court erred in holding that the obligation to support the weight of the building then standing on plaintiff's lot was thrown upon the defendants by virtue of the provision of the building code of Milwaukee hereinafter quoted; (2) that the findings of fact, particularly those designated in the above statement of facts as (1) to (7) and (9) to (11) inclusive, were contrary to the clear preponderance of the evidence; (3) that the damages as found by the court had no support in the evidence or were in any event excessive; and lastly, should have been diminished by offsetting the cost to defendants in underpinning plaintiff's building.

As incident to plaintiff's ownership of his lot he had the absolute right, so far as his land was in its natural condition, to lateral support from defendant Wellauer's lot. So far as plaintiff had added to the weight of the soil by the erection of his building, for such additional load plaintiff himself must provide by proper support and care whenever defendant wished to exercise his right to excavate on his land. In the absence of actual knowledge by plaintiff of defendant's intended excavation so near plaintiff's building that danger thereto might reasonably be anticipated, it was incumbent on defendant to give reasonable notice of such intention, that plaintiff might have an opportunity to protect and support his building. The above is supported by the following au-

thorities: *Laycock v. Parker,* 103 Wis. 161, 177, 79 N. W. 327; 2 Cooley, Torts (3d ed.) 1236–1238; *Transportation Co. v. Chicago,* 99 U. S. 635, 645; *Starrett v. Baudler* (Iowa) 165 N. W. 216, L. R. A. 1918B, 528; *Gilmore v. Driscoll,* 122 Mass. 199, 207; *White v. Nassau T. Co.* 168 N. Y. 149, 155, 61 N. E. 169; *Walker v. Strosnider,* 67 W. Va. 39, 67 S. E. 1087, 21 Am. & Eng. Ann. Cas. 1 and note; *Gerst v. St. Louis,* 185 Mo. 191, 84 S. W. 34.

Plaintiff contends for the view, which was apparently acquiesced in by all concerned at the time the excavations in question here were being made, viz. that the obligation to support the weight of plaintiff's building was shifted to defendants. This contention is based upon the theory that inasmuch as by sec. 3, ch. IV, of the charter of the city of Milwaukee the common council is vested with full power and authority to make ordinances and regulations for the government and good order of the city and shall have authority to so provide—"anything in a general law of this state to the contrary notwithstanding—by ordinances, resolutions, by-laws, rules or regulations;" and that in the same chapter among the specific subject matters so to be regulated appears the following: Sub. 62. "To control and regulate the construction of buildings, chimneys and stacks, and to prevent and prohibit the erection or maintenance of any insecure or unsafe buildings, stack, wall or chimney, in said city, and to declare them to be nuisances, and to provide for their summary abatement;" and that in 1914 there had been adopted by the common council of Milwaukee a building code (Milwaukee Code, 1914) for the city containing, among other provisions, as follows: "Section 43. Any person, firm or corporation making excavations or causing the same to be made shall properly guard them and shall so protect them that the adjoining soil shall not cave in, and no one shall excavate so as to injure any adjoining ground or building," there was by the clause "and no one shall excavate so as

to injure any adjoining . . . building," a change made in what would otherwise be the respective rights and liabilities of the parties under the established doctrines above stated.

Such conclusion, however, is unwarranted. Such well-established property rights as are here involved between owners of adjacent lands cannot be taken away or substantially changed except by express declaration of the legislature, either by statute or by expressly delegating such a power to the common council. *Carpenter v. Reliance R. Co.* 103 Mo. App. 480, 77 S. W. 1004. Neither of such is found in this case.

There are well-recognized limitations upon the powers of common councils in the making of valid ordinances and regulations. They must not be inconsistent with the general laws of the state. *Baraboo v. Dwyer,* 166 Wis. 372, 377, 165 N. W. 297, attempting to fix a speed limit less than that fixed by statute; *Morgenroth v. Milwaukee,* 125 Wis. 663, 668, 105 N. W. 47, affecting procedure for violation of city ordinances. Such ordinances must be in harmony with the common law as well as the public policy of the state; *Barling v. West,* 29 Wis. 307, 315, an attempt to prohibit at a temporary stand upon a person's own property the sale of lemonade without having a license; *Mills v. Sweeney,* 219 N. Y. 213, 114 N. E. 65, providing for a referendum on questions of public policy; *State v. Darnell,* 166 N. C. 300, 302, 81 S. E. 338, attempt to prohibit the ownership of land by white or colored people except the majority in such district are white or colored; *Marengo v. Rowland,* 263 Ill. 531, 533, 105 N. E. 285, ordinance singling out and prohibiting the keeping open of barber shops on Sundays. The effect of a statutory regulation in such regard when made is shown in such cases as *Regan v. Keyes,* 204 Mass. 294, 90 N. E. 847; *Ketcham v. Newman,* 141 N. Y. 205, 36 N. E. 197. The rights of the parties, therefore, must be determined without regard to this ordinance.

No notice was given to plaintiff by defendants of their in-

tention to excavate close to and below the plaintiff's wall upon the Wellauer lot. Plaintiff had actual knowledge thereof from seeing them at work on September 24th. At this time they had already excavated under plaintiff's foundation and removed some of the dirt and filled up at least one of the sections of about five feet in length with the stone and concrete underpinning. They had commenced this work upon plaintiff's premises on the 22d or 23d, and on the 24th, from failure to give notice to plaintiff, had already become liable for any resultant damage to plaintiff's building that might then have been occasioned.

On the 25th the plaintiff, upon his summons and complaint herein, obtained an order, duly served, which required the defendants and all acting under them to "desist and refrain from removing any of the earth and support from, around, under, and beneath the building of said plaintiff."

The defendants, as appeared from the affidavit of Mr. Wellauer on the motion immediately made by them to vacate such injunction, declared that the effect of such injunction was to seriously delay and impede the prosecution of the work on the Wellauer lot and that the excavating contractor threatened to withdraw from the premises if he could not be allowed to proceed. Upon the hearing of such motion testimony was given by the building inspector and the defendant *Hartman* on behalf of defendants, but not made a part of the record herein, and thereupon the injunction was vacated and set aside upon condition of the giving of a bond. The bond, executed and approved by the court on the same day, contained the following recitals:

"Whereas, the plaintiff herein has obtained an injunction enjoining and restraining the defendant, his servants, agents, and employees, from removing any of the earth and supports from and under the building situated and located on the property of the said plaintiff as aforesaid; and

"Whereas, the defendant herein has obtained an order modifying and vacating said injunction, so as to permit the defendant, under the direction and advice of competent and

capable engineers and with the approval and consent of the building inspector of the city of Milwaukee, Wisconsin, to make such excavations and remove such earth and supports from and under the building located on the property of the plaintiff as aforesaid:

"Now, therefore, we, Jacob Wellauer as principal, and . . . do hereby undertake that the defendant Jacob Wellauer will pay to the plaintiff any judgment not exceeding the sum of twenty thousand dollars which he may recover against the defendant in this action."

As appears from defendants' testimony the work of undermining and underpinning plaintiff's building and removing the soil from his premises was continuous from the time of starting, September 23d, until October 2d, and during the period while the proceedings were pending on the motion to dissolve the injunction, and that at least two thirds of such work was finished by September 30th, the time when the order dissolving the injunction was made and the bond given.

The defendants were very desirous of avoiding any delay in the work and consequent expense incident to any such delay, the excavator threatening to leave the work if he were to be longer interrupted.

The court found upon sufficient evidence that the proper and usual method to have been used to prevent injury to the building was substantially that of running of iron beams or wooden timbers through the walls at intervals and supporting them on jack-screws resting on suitable framework on the Wellauer lot and within plaintiff's basement and the use of diagonal braces running from the Wellauer lot to the side of plaintiff's building. Such a method would more or less have inconvenienced and delayed the progress of excavating on the Wellauer lot and would, under defendants' testimony, have been far more expensive than the method used by them.

Upon the facts disclosed in this case, the liability already incurred from excavating on plaintiff's premises before giving notice, the carrying on of the work during the pendency of the injunction, the position defendants assumed by their

application to vacate it, the giving of the bond with the recitals above given, the prosecution of the work in their own way and by their own methods and supposed greater convenience and economy, made their further carrying on the work already undertaken of undermining and supporting plaintiff's building more than a mere gratuitous performance by them of the obligation resting under the law upon plaintiff to support his own building, and created such a relationship between the two that there arose an obligation on defendants' part that the work should be prosecuted by reasonable and proper methods and with reasonable skill and care. A breach on their part of such obligation made them liable for consequent damages.

We cannot set aside any of the findings of the court for want of evidence.

On such findings as to the method used and that it was an improper one, there is substantial support from what appears in the record as to the advantages of the other method suggested, also as to the possible insufficiency of time that was allowed for the hardening of the concrete mixture used in the underpinning, and the further fact, as shown by the testimony of Mr. Guthrie, one of defendants' witnesses, that the eight-foot span or open space that was in some of the sections made by defendants in building up the underpinning was too great to stand the necessary strain from the weight of such a wall.

Particular criticism is made by defendants upon the finding that plaintiff's building was plumb prior to the time defendants commenced their excavating; and while there is considerable testimony which would have supported a finding to the contrary, yet we think the court was justified in his conclusion in that regard, particularly from what is disclosed by a photograph taken of plaintiff's building in 1914 in connection with a matter in which none of the parties hereto was interested.

The court was also warranted by the evidence in refusing

to find that the listing in this wall was caused by the pumping of water out from the tunnel which was being driven along on Edison avenue near this property and the suggested draining of the soil and loosening of the foundation under this building, as argued by appellants.

On the question of damages the court received evidence of the amount it would cost to repair the building and also the amount of its diminished value by reason of the damages, and adopted as the measure to be allowed the plaintiff the lesser of these two amounts, that is, the diminution in value. This was the correct rule. *Bunker v. Hudson,* 122 Wis. 43, 55, 99 N. W. 448; 13 Cyc. 152; *Hopkins v. American P. S. Co.* 194 Mass. 582, 80 N. E. 624; *McGrath v. Heman C. Co.* 183 Mo. App. 522, 526, 167 S. W. 1086; 68 L. R. A. 703, note.

There is evidence to support this finding as to the amount of damages and it must stand.

In the disposition we are making of this case we can see no reason for granting, as requested by defendants, any allowance to them for their expense in doing this work.

By the Court.—Judgment affirmed.

KERWIN and ROSENBERRY, JJ., took no part.

SCHMITT, Respondent, vs. SCHMITT and another, Appellants, and FRANKE, Respondent.

SCHMITT, Respondent, vs. FRANKE, imp., Appellant.

March 5—April 2, 1919.

Judicial sales: Suppressing competition: Validity of agreement: Public policy: Fraud.

1. A finding by the trial court to the effect that an agreement had been made whereby an intending bidder was induced to refrain from bidding at a foreclosure sale of corporate stock, is *held* to be against a clear preponderance of the evidence.
2. An agreement or combination among prospective bidders, under which one is to bid for all at a public judicial sale of

property, is not necessarily contrary to public policy if not made with intent to suppress competition or for any other fraudulent purpose; and where no fraud in fact results the sale should not be set aside, because of such agreement, at the suit of one who did not sustain any damage by reason thereof.

3. The mere fact that plaintiff, who had an interest in corporate stock which was sold at a foreclosure sale, was deprived of such interest by the sale, does not show that an agreement among his former associates by which one of them was to bid in the stock for their joint benefit, thus eliminating plaintiff from the business, was fraudulent or unlawful.

4. *Schmitt v. Franke,* 160 Wis. 347, which was an action for specific performance of the agreement above mentioned, is distinguished. The decision in that case is not binding in this case as being *res judicata,* because there is not identity of parties; nor is it binding under the doctrine of *stare decisis,* the evidence in the cases being materially different and there having been in that case a finding of fraud as a matter of fact.

APPEALS from a judgment of the circuit court for Milwaukee county: MARTIN L. LUECK, Judge. *Reversed.*

This is an independent action in equity commenced by the plaintiff August 20, 1915, in the circuit court for Milwaukee county, for the purpose of vacating an order affirming a foreclosure sale of corporate stock under date of February 16, 1910. From a judgment vacating and setting aside an order of confirmation and ordering a resale of the stock the defendants appealed.

The facts are as follows: June 25, 1907, the parties to this action and one Conrad Schmitt were stockholders in the Schmitt Brothers Tobacco Works, which at or about that time had acquired the property of the Hansen–Schmitt Company, a competitor of the Schmitt Brothers Tobacco Works, the consolidation having been brought about by an exchange of stock in the Schmitt Brothers Tobacco Works for the stock of the Hansen-Schmitt Company. *Mathias F. Schmitt, C. M. Schmitt,* and Conrad Schmitt are brothers. *Mathias F. Schmitt, C. M. Schmitt,* and *Carl W. Walter* were in the active management of the corporation. The defendant *Franke* was a tobacco broker of Louisville, Ken-

tucky, of considerable means, the largest stockholder, and contributed the principal financial support to the company.

On June 25, 1907, an agreement of sale was entered into between *E. C. Franke* as party of the first part, and *Mathias F. Schmitt, C. M. Schmitt, Carl W. Walter,* and Conrad Schmitt as parties of the second part, providing for the sale by *E. C. Franke* to the said parties of the second part of 701 shares of the capital stock of said corporation, the parties of the second part executing to said *Franke* their three promissory notes in payment thereof as follows: one for $11,750, due July 1, 1909; one for $9,320, due July 1, 1910; one for $9,320, due July 1, 1911. The agreement of sale contained a provision that upon default in the payment of any of said notes those remaining unpaid might, at the option of said *Franke,* be declared due. Thereafter and before the first note became due disagreements arose between the plaintiff, *Mathias F. Schmitt,* and the others, resulting in his withdrawal from active participation in the affairs of the company and his removal to California. There was default in the payment of the first note upon its coming due. Thereupon *Franke* declared the whole amount due. Extended negotiations occurred between *Franke, C. M. Schmitt,* Conrad Schmitt, and *Walter* with a view of devising some plan by which the former might retain their interest in the stock upon some terms satisfactory to *E. C. Franke.*

It pretty plainly appears that there was a desire on the part of all to eliminate the plaintiff, *Mathias F. Schmitt,* from the company. No satisfactory arrangements, however, were agreed upon, and in November, 1909, *Franke* brought an action to foreclose the contract of sale. A foreclosure judgment was entered January 27, 1910, which ordered a sale of the stock, pursuant to which order the stock was sold at public auction February 14, 1910, and sale was in due time confirmed.

It appears that Conrad Schmitt made some effort to place himself in a position to bid at the sale and to that end nego-

tiated with one Epstein, who indicated a certain willingness to advance money which would enable Conrad to bid about $31,000 for the stock at the sale. Conrad now claims that he was induced to refrain from bidding at the sale because of an agreement between himself, his brother *C. M. Schmitt, Carl W. Walter,* and *E. C. Franke* that *Franke* should bid in the stock at the sale for the amount due on the notes plus expenses of sale and thereafter enter into a new arrangement with himself, *C. M. Schmitt,* and *Carl W. Walter* for the sale of the stock upon terms which would enable them eventually to pay therefor and become the owners thereof. This arrangement contemplated the elimination of *Mathias F. Schmitt* from any interest in the company. That there was such an arrangement is denied by *Franke, C. M. Schmitt,* and *Walter.* At the sale the stock was bid in by *Franke* for $31,552.65, being the entire amount which was due on the stock, together with the costs and expenses of the foreclosure and sale.

On the day of and after the sale *Franke* gave to *C. M. Schmitt* and *Carl W. Walter* an option for the purchase of 651 shares of such stock for $31,500.90, plus fees and expenses incurred in the foreclosure suit, which option expired May 15, 1910. *Schmitt* and *Walter* were unable to avail themselves of the option before it expired. Further negotiations followed, and on October 1, 1910, *Franke* entered into another contract of sale with *C. M. Schmitt* and *Carl W. Walter* for the sale of 501 shares of such stock for the sum of $31,000, to be paid upon terms therein indicated, with which contract the said *C. M. Schmitt* and *Carl W. Walter* eventually complied and became the owners of said stock.

This action was brought by *Mathias F. Schmitt* in September, 1915, to set aside the sale and confirmation thereof under the foreclosure action upon the theory that the agreement claimed by Conrad Schmitt to have been entered into which prevented him from bidding at the sale resulted in a chilling of the sale and operated as a fraud upon his rights.

The circuit court found the existence of the agreement claimed by Conrad Schmitt which resulted in his refraining from bidding at the sale, and also found that "after the entry of the judgment of foreclosure and prior to the sale Conrad Schmitt had some negotiations with one Isador Epstein in regard to the raising of money with which to purchase said 701 shares of stock at the sale, but prior to the time said negotiations ceased neither Conrad Schmitt nor said Isador Epstein had considered the raising of an amount of money more than sufficient to pay the principal, interest, and costs due to *E. C. Franke;* that Conrad Schmitt was not able financially to purchase said 701 shares of stock without assistance from others;" and as a conclusion of law it was found that "a fraud was committed upon the plaintiff, *Mathias F. Schmitt,* by the defendants *E. C. Franke, C. M. Schmitt,* and *Carl W. Walter* and Conrad Schmitt in the stifling of competition at the sale."

For the appellants *Schmitt* and *Walter* there were briefs by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

Frank M. Hoyt of Milwaukee, for the defendant *Franke.*

Maurice A. McCabe, attorney, and *Walter H. Bender,* of counsel, both of Milwaukee, for the respondent *Mathias F. Schmitt.*

OWEN, J. The keystone of the arch of plaintiff's case is the alleged agreement between defendants and Conrad Schmitt by which it is claimed that Conrad Schmitt was induced to refrain from bidding at the sale. If the finding to the effect that such an agreement was made be against the clear preponderance of the evidence it completely disposes of plaintiff's case. This feature of the case has received our earnest consideration, and we are convinced that the finding in such behalf is against the clear preponderance of the evidence and cannot be permitted to stand. The finding is supported only by uncorroborated testimony of Conrad Schmitt.

It is flatly denied by the defendants and each of them. It is impeached by documentary evidence in the nature of letters and other correspondence passing between the parties prior to the time of the sale. It is discredited by the testimony of Lawrence A. Olwell, an attorney of this court of high standing and respectability, as well as the testimony of Thomas A. Barker, an attorney at law of Louisville, Kentucky, who acted as *Mr. Franke's* adviser during the negotiations, and the existence of the agreement is utterly inconsistent with the acts of the defendants and the dealings and negotiations between them subsequent to the sale, the evidence as to much of which is of a documentary nature and irrefutable in character. We are convinced that the finding of the existence of the agreement by reason of which Conrad Schmitt claims he refrained from bidding at the sale is against the clear preponderance of the evidence and cannot stand. While this opinion well might end here it is proper to say that the responsibility always felt in setting aside a finding of the trial court is relieved by a consideration of the law applicable to the case. This leads to the same conclusion even though the finding under consideration be left undisturbed.

It will be noted that the court found as a conclusion of law "that a fraud was committed upon the plaintiff, *Mathias Schmitt,* by the defendants *E. C. Franke, C. M. Schmitt, Carl W. Walter,* and Conrad Schmitt in a stifling of competition at the sale." There is no finding of fact to that effect. It is apparent that the trial court adopted plaintiff's contention that any agreement or combination among prospective bidders by virtue of which one bids for all is against public policy and void, irrespective of whether the property sells at a fair price or other fraud results. That doctrine finds support in the earlier cases, but it has been materially modified by modern decisions. It is now quite generally recognized that an arbitrary condemnation of a combination or agreement whereby one of several bids for all as frequently discourages, as it promotes, competition. Many properties are

subjects of sales for which an adequate price could not be secured if pooling of interests be not permitted, as the fair value thereof is beyond the ability of the individual to pay. Courts now look to the purpose of the agreement, and unless it be found that it was entered into with the object of suppressing competition at the sale, or accomplishment of other fraud, the sale will not be set aside by mere reason of the agreement itself. As said in *Woodruff v. Harrington,* 175 Pa. St. 302, 34 Atl. 667, 52 Am. St. Rep. 845:

"Lien creditors, as well as others, may purchase jointly at sheriff's sale, if all be open and fair. A combination of interests for that purpose is not necessarily corrupt. . . . It is . . . the end to be accomplished which makes such a combination lawful or otherwise. If it be to depress the price of the property by artifice, the purchase will be void; if it be to raise the means of payment by contribution, or to divide the property for the accommodation of purchasers, it will be valid. . . . The crucial test of all such arrangements is whether it is fair and without intent to depress the property and get it at an undervalue. The question must in all cases be referred to the jury, and it was error in the court below to rule it as a question of law irrespective of the element of fraud in fact."

In discussing this question in 16 Ruling Case Law, at page 70 it is said:

"The doctrine that would prohibit associations of individuals to bid at the legal public sales of property, as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably to the evil consequences it was intended to avoid. Instead of encouraging competition it would destroy it, and sales in many instances could be effected only at such a sacrifice as would bring the property within the reach of the means of the individual bidders. . . . The extent to which the doctrine will now be carried therefore seems to embrace only cases of fraudulent acts and combinations having for their object to suppress and stifle fair competition at the sale with the purpose of acquiring the property at less than its fair value."

As a preface to a collation of authorities on this subject in a note to the case of *Coal & Coke R. Co. v. Marple* (70 W. Va. 136, 73 S. E. 261), 38 L. R. A. N. S. 719, the rule is stated thus:

"The authorities all agree that a contract entered into by several persons, under which one of them is to purchase property at public sale for the benefit of all the parties, is void as against public policy, and is ground for setting the sale aside where it appears that it was made to prevent competition at the sale or for any other fraudulent purpose. But the great majority of the cases hold that the mere combination does not of itself amount to such fraud as to render the contract unenforceable as between the parties, or to constitute grounds to set aside the sale. Numerous early decisions holding the mere combination of itself fraudulent and as ground for setting aside the sale have been overruled."

This rule is supported by reason as well as the practical necessities of the present-day business world. Where an agreement of this kind does not suppress competition, result in a sale of property at less than its fair value, nor the accomplishment of any other fraud, a judicial sale should not be set aside at the suit of one who is unable to show that he has sustained injury by reason thereof.

There is no finding of fact in this case that the plaintiff sustained damage or injury by reason of the agreement which the trial court evidently regarded as fraudulent *per se*. It is undisputed that plaintiff was in no position to bid and did not bid at the sale. The trial court found that Conrad Schmitt did not contemplate bidding more than the amount of the judgment plus costs and expenses of the foreclosure suit, which was the exact amount bid by *Frankc*. The defendants offered evidence to show that the stock sold for all it was worth, to which the plaintiff objected and the objection was sustained by the court.

The plaintiff is in no position to contend, and in fact does not contend, that the stock sold at less than its actual value. What then is the basis of plaintiff's appeal to a

court of equity? He utterly fails to show that he has been damaged in any respect. The wrong which he seeks to redress is the alleged invasion of a mere naked, formal right resulting in no injury to him and which the law no longer regards as inimical to public welfare or against public policy. To be sure he was deprived of his interest in the stock, but that not only was inevitable, but was the plain purpose of the foreclosure proceedings. It was the right of the defendants to decline his association longer, and no unlawful means were employed to secure his elimination. In fact it is not contended, as we understand it, that there was anything actionable in the desire or purpose of the defendants to eliminate him from the business. The claim is that unlawful means were employed to such end, and this claim, we trust, we have sufficiently answered.

This opinion should not be brought to a close without referring to the case of *Schmitt v. Franke,* 160 Wis. 347, 151 N. W. 793, where the agreement here in question was considered by this court in an action brought against Franke to compel specific performance thereof. We do not consider ourselves bound thereby upon the doctrine of *res adjudicata* because there is not identity of parties, nor upon the principles of *stare decisis* because the evidence in this case is concededly materially different from the evidence in that. Furthermore, there was an affirmative finding of fraud in that case as a matter of fact which is lacking here and plainly distinguishes the two cases. While there may seem to be an inconsistency in results, the conclusion in each case is justified by the record upon which it is founded and the two are in harmony.

By the Court.—Judgment reversed, and the case remanded with instructions to enter judgment dismissing the plaintiff's complaint.

KERWIN and ROSENBERRY, JJ., took no part.

MARKHAM, Respondent, vs. HIPKE, Appellant.

March 5—April 2, 1919.

Evidence: Privileged communication to physician: Contempt of court.

The privilege granted by sec. 4075, Stats.—providing that no physician shall be *permitted* to disclose information acquired in attending a patient and which was necessary to enable him to prescribe,—is the privilege of the patient, not of the physician. The refusal of a physician, therefore, to disclose such information upon his adverse examination under sec. 4096, Stats., in an action against him for malpractice, after the patient had expressly waived said privilege and he had been ordered by the court to answer, was a contempt of court.

APPEAL from orders of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *McGovern, Hannan, Devos & Reiss* of Milwaukee, and oral argument by *Timothy J. Hannan.*

For the respondent the cause was submitted on the brief of *Lehr & Kiefer,* attorneys, and *Julius E. Kiefer,* of counsel, all of Milwaukee.

WINSLOW, C. J. The action is for malpractice. The defendant, a physician, was being examined adversely before trial, under sec. 4096, Stats., and refused to disclose information received by him while treating the plaintiff as a patient and which was necessary to enable him to prescribe, although the plaintiff expressly waived the statutory privilege of secrecy and he was ordered to answer by the court. For this refusal he was adjudged guilty of contempt, and appeals.

The sole question presented is whether the privilege granted by sec. 4075, Stats., is the privilege of the patient or of the physician. We think it is unquestionably the privilege of the patient. This was so held in *Boyle v. Northwest-*

ern M. R. Asso. 95 Wis. 312, 70 N. W. 351, when the statute provided that no physician should be *compelled* to disclose such information. By ch. 322, Laws 1911, the section was amended by substituting the word *permitted* for the word *compelled* and by adding a provision allowing the information to be disclosed by the physician as a witness in his own behalf in a civil action for malpractice and in a criminal action therefor, when the patient or his legal representatives shall have first given evidence relating thereto.

It was not entirely easy to construe the word *compelled* as giving the privilege to the patient, as may be seen by examination of the opinion in the *Boyle Case,* but it is very easy to so construe the word *permitted.* The latter word means practically the same as *allowed,* which is the word used in secs. 4074 and 4076, Stats., protecting communications made to clergymen and attorneys respectively, and this latter word has generally, if not uniformly, been construed as granting the privilege to the penitent or the client, as is pointed out in the *Boyle Case.*

Cases decided in this court since the last named change was made inferentially if not directly sustain this view. *Canning v. Chicago & M. E. R. Co.* 163 Wis. 448, 157 N. W. 532; *McGinty v. Brotherhood of Railway Trainmen,* 166 Wis. 83, 164 N. W. 249; *Casson v. Schoenfeld,* 166 Wis. 401, 166 N. W. 23.

By the Court.—Orders affirmed.

KERWIN and ROSENBERRY, JJ., took no part.

WILL, Administratrix, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

March 5—April 2, 1919.

Street railways: When person ceases to be a passenger: Assault by motorman: Liability of company.

1. A passenger on a surface street railway ceases to be such as soon as he safely steps from the car into the public street and

has had a reasonable opportunity to leave the place at which he alights, provided he is set down at a place which is reasonably safe and proper for that purpose.

2. Plaintiff's intestate, while riding on a street car, had been rebuked by the motorman for smoking in the car and for spitting on the floor. After he had alighted and as the car was starting he applied an insulting epithet to the motorman, who thereupon checked the car and, upon repetition of the epithet, descended to the street and engaged in an altercation with him which continued until both of them were near the sidewalk. The motorman then struck the decedent with his fist, causing him to fall and sustain an injury which resulted in his death. *Held,* that the decedent had ceased to be a passenger before the assault which caused the injury, that such assault was independent and separate from any prior altercation in the car, and that in making it the motorman was not acting within the scope of his employment so as to render the street railway company liable.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This is an action by *Bertha Will,* as administratrix of the estate of Herman Will, to recover from the *Milwaukee Electric Railway & Light Company* and Fred Beguhl damages for the death of Herman Will, her husband. The death of Will, it is claimed, resulted from injuries inflicted by Fred Beguhl, a motorman for defendant corporation.

On December 24, 1915, Herman Will was a passenger on a street car belonging to the defendant corporation and run by Fred Beguhl as motorman. The route of the car in question was north upon Seventh street to Germania, thence diagonally northwest to Eighth street, and north upon Eighth street. Proceeding north from Walnut street the intersecting streets are Sherman, Harmon, Lloyd, Garfield, North avenue, Lee and Wright streets.

Will and a young man got on the car at Walnut and Seventh streets. Will had a pipe in his mouth. When he walked towards the front of the car he took this pipe out of his mouth. At North street two women and a man boarded the car. At Harmon street the car stopped, but no one got off.

The motorman then said to Will: "There is no smoking allowed here." Will said: "No steam on." The motorman replied: "By the looks of things you have plenty of steam on, but you can't smoke in here." Will then put his pipe in his pocket and Beguhl turned around and started his car. After the car had left North avenue and before it reached Lee street the motorman saw, by the reflection in the front windows of the vestibule, that the deceased spat upon the floor and that he had his pipe in his mouth and was again smoking. The young man who had boarded the car with Will alighted at Lee street. When the car stopped for this purpose Beguhl turned around and noticed that Will had spat three times. He told Will that no spitting was allowed in the car, and that he would have to cease smoking and spitting or that he, Beguhl, would put him off the car or have an officer arrest him. Will showed some surprise that the motorman knew he had spat, but merely remarked, "I know that," to the other's remonstrance. At Wright street Beguhl received a signal to stop the car and Will alighted from the car by the front door. Beguhl was about to start the car when Will, from the pavement, applied an insulting epithet to Beguhl. The car had just started, but Beguhl stopped it, stepped to the door, and said "What's that?" and, when Will repeated the insulting epithet, descended and engaged in an altercation with Will. Both parties moved towards the sidewalk in a threatening attitude. Will made a movement towards his pocket and Beguhl struck him on the point of the chin. Will fell, his head striking the icy pavement, suffering a skull fracture from which his death resulted two weeks later. A pocket-knife dropped from Will's hand when he was picked up and Beguhl claims that Will threatened to attack him with this before any blow was struck.

In her complaint *Bertha Will* alleges that the altercation arose in the car over Will's rights as a passenger, that he was attacked and fatally injured by Beguhl as an agent of the defendant company. She alleges that she was entirely de-

pendent upon Herman Will for support and she asks damages to the extent of $30,000 from the street car company and Beguhl.

In its answer the street car company denies that Beguhl acted as its agent in the assault and alleges that Will had left the car and ceased to be a passenger and that Beguhl had also left the car when the encounter occurred. Beguhl, in his answer, alleges that he acted only in self-defense and without unnecessary violence.

The court entered judgment dismissing the complaint as to the street car company and awarding the company $91.84 costs from plaintiff. Thereupon the plaintiff took a voluntary nonsuit as to defendant Beguhl and appealed from the judgment in favor of the railway company.

For the appellant there were briefs by *William L. Tibbs* and *Henry F. Cochems,* attorneys, and *Geo. A. Gessner,* of counsel, all of Milwaukee, and oral argument by *Mr. Gessner.*

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

SIEBECKER, J. The question presented under the facts and circumstances given in detail in the foregoing statement is: Did the relationship of passenger and carrier exist at the time the assault commenced? There is no evidence tending to show that the defendant company either authorized or ratified the assault. The controversy in this case is involved with the operation of an ordinary surface street railroad. The rules governing the liability of railroad companies for assaults by employees on passengers do not in their entirety apply to surface street railroads because "it is a general rule in such cases that a person ceases to be a passenger as soon as he safely steps from the car into a public street and has had a reasonable opportunity to leave the place at which he alights, provided he is set down at a place which is reason-

ably safe and proper for that purpose." 10 Corp. Jur. p. 627, § 1049, par. 3; *Blomsness v. Puget Sound E. R. Co.* 47 Wash. 620, 92 Pac. 414, 17 L. R. A. N. S. 763, cases noted on pp. 764–769; *Robertson v. W. J. & S. R. Co.* 79 N. J. Law, 186, 74 Atl. 300; *Wise v. Covington & C. St. R. Co.* 91 Ky. 537, 16 S. W. 351.

The evidence in this case shows that the motorman received a signal to stop at Wright street, that he did so, and when the car had stopped Will proceeded to the front exit door, which the motorman opened for him. Will stepped off the car, and immediately turned around and applied an abusive epithet to the motorman, who was in the act of starting the car. Upon hearing Will he checked the car, stepped towards the door, saying "What's that?" and when Will repeated the epithet the motorman in resentment alighted on the street and continued the altercation until both of them were near the sidewalk. Then the motorman struck Will with his fist, causing Will to fall and injuring him, which resulted in Will's death. In the light of these facts we are persuaded that the trial court correctly determined the case by holding that:

"The fact that the deceased, stung by what he may have considered a rebuke received while on the car, felt like calling the motorman names, would not revive or extend the relation of carrier and passenger. The company, by its agent, must do something. . . . No act, no word, passed between the motorman and the deceased at the time of the termination of the relation between passenger and carrier. . . . When the motorman left the car after the deceased had left it, he very evidently was not engaged in the company's business nor concerned about it."

It is clear that the relationship of passenger and carrier had been terminated when the assault commenced resulting in the injury. The controversy prior to the transaction for the stop at Wright street had concluded, hence the assault at this place was independent and separate from the prior altercations concerning Will's transgressions of smoking in

and spitting on the floor of the car. Under these facts and circumstances there is no ground for a claim of liability of the company on the theory that the servant's acts complained of are within the scope of his employment.

By the Court.—The judgment appealed from is affirmed.

KERWIN and ROSENBERRY, JJ., took no part.

CALLAHAN and wife, Appellants, vs. ORDER OF RAILWAY CONDUCTORS OF AMERICA, Respondent.

March 5—April 2, 1919.

Insurance: Benefit societies: Fraternal orders: Expulsion of members: Construction of laws: Grievance "in the hands of a committee:" Trials: Appeals.

1. Voluntary unincorporated fraternal administrative orders such as the defendant in this case have a right to prescribe any reasonable grounds for the expulsion of members; courts will not look into the technical correctness of either the proceedings prescribed or the proceedings followed; and any reasonable or permissible construction which such an order gives to its own constitution, laws, or rules will govern unless clearly subversive of personal or property rights.
2. A law of the defendant order providing for expulsion of any member "who by verbal or written communication to the railroad officials or others interferes with a grievance that is in the hands of a committee" applies to all grievances actually in the hands of a committee and considered so to be by the committee itself and by all parties interested, regardless of mere technical defects in the manner of the appeal by which they came before the committee.
3. A member who did not, in any of his several trials for interference with a grievance actually in the hands of a committee, make any claim that the matter was not lawfully before the committee at the time of such interference, cannot in an action for damages for his alleged unlawful expulsion be heard to question the regularity of the appeal to the committee.
4. The constitution of the defendant order authorized the president to "interpret all laws of the order, subject to appeal to the next session of the grand division." A law gave him power to annul any trial before a subordinate division and to

remand the case for a new trial either to "the division having original jurisdiction" or to any one of the three divisions nearest thereto. A ruling by the president that upon the annulment of a second trial in a division other than that in which the first trial was had, the case might be sent back for a third trial to any one of the three divisions nearest to that in which the second trial took place, was acquiesced in by the grand division. *Held,* that such ruling interpreted in a permissible way the words "original jurisdiction" and hence became a law of the order.

5. Under sec. 32 of the laws of the order, relating to trial of members, when the president annulled an acquittal the case must be sent to a subordinate division for retrial; and when he affirmed a conviction the case must be sent to the board of directors, and the decision of that board was made final. Another section gave a right of appeal to the grand division from the decision of the president, "except as provided in" said sec. 32. *Held,* that no appeal lay to the grand division from a decision of the president annulling an acquittal and sending the case to a subordinate division for retrial.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action to recover damages for alleged unlawful expulsion from the defendant order. The plaintiff *Patrick Callahan* joined his wife, *Emma,* as a party because she was a beneficiary in a benefit certificate issued to him by the order. Hereafter he will be referred to as the plaintiff. The defendant is a voluntary unincorporated fraternal order organized under the laws of Iowa, whose members are railway conductors of the United States and Canada. It has a constitution and set of laws denominated statutes under which it is governed. It has a president and board of directors, general committees, and a grand division composed of certain officers and delegates from local divisions that meets triennially at a place designated by it. The powers of the grand division as defined by the constitution are: "First, legislative; second, executive; third, judicial. All general powers, legislative, judicial, and executive, not expressly delegated to subordinate divisions, and all powers necessary

to enforce or carry into effect this constitution or any laws hereafter enacted, repose in the grand division." The constitution also provides that the president "shall interpret all laws of the order, subject to appeal to the next session of the grand division." Sec. 32 of the statutes provides that:

"The proceedings and evidence in any trial shall, upon the request of any member, be submitted to the president for review, and he shall have the power to set aside and annul any trial, and remand it for a new trial, to either the division having original jurisdiction, or to any one of the three divisions nearest the one having original jurisdiction.

"Request for review of trial must be made within three months from date of trial, and proceedings and evidence must be submitted to the president within six months of date of trial. If the trial result in a verdict of expulsion and the decision of the division is affirmed by the president, the records reviewed by the president, and his decision, shall be submitted to the board of directors at their first meeting thereafter, and the decision of the board of directors shall be final in the case."

Sec. 33 provides that:

"Any member shall have the right to appeal to the president from the decision of any division and, except as provided in sec. 32 of the statutes, from the decision of the president to the grand division, provided such appeal is taken before the close of the fiscal year following that in which the decision appealed from was made."

Sec. 43 provides that:

"Any member, including complainant, who by verbal or written communication to the railroad officials or others interferes with a grievance that is in the hands of a committee, shall be expelled when proven guilty."

In April, 1914, charges were preferred by one O'Malley against plaintiff to the effect that he with others sent a written communication to Mr. Dailey, superintendent of the Wisconsin division of the Chicago & Northwestern Railway Company, interfering with a matter involving the seniority

rights of three conductors of said road which Dailey then had for adjustment with the general committee. Plaintiff was a member of division 46 at Milwaukee and was tried before said division and acquitted. O'Malley appealed to the president, and the verdict of acquittal was set aside and the case sent to division 293 at Chicago, which division also acquitted him. O'Malley again appealed to the president, and he again set aside the verdict of the division and sent the case to division 41 at Blue Island for trial. Plaintiff objected to the jurisdiction of this division for reasons stated in the opinion, but his objections were overruled and he was tried and convicted. He appealed to the president and his conviction was affirmed. The case then went to the board of directors, and upon its affirmance of the conviction he was expelled and his benefit certificate canceled. To review the validity of the proceedings of the order expelling him plaintiff instituted this action. The trial court entered judgment dismissing the complaint upon the merits, and plaintiff appealed.

Lawrence A. Olwell of Milwaukee, for the appellants.

For the respondent there was a brief by *Lines, Spooner & Quarles* of Milwaukee, attorneys, and *John M. Grimm* of Cedar Rapids, Iowa, of counsel, and oral argument by *George Lines.*

VINJE, J. Plaintiff does not seriously challenge the fact that the charge brought against him constituted an offense under the statutes, which if proven, according to the rules of the order, justified his expulsion. He admits he signed the remonstrance that was sent to Dailey and concedes that it constituted an interference within the meaning of sec. 43 of the statutes if there was a matter properly before the general committee. But he claims (a) that there was no matter for adjustment lawfully before the general committee; (b) that division 41 at Blue Island had no jurisdiction to try him; and (c) that he was denied the right of appeal to the grand division from the decision of the president setting aside his ac-

quittal and remanding the case to division 41 at Blue Island for retrial. Bearing in mind that fraternal administrative orders such as defendant have a right to prescribe any reasonable grounds for expulsion, and that courts will not look into the technical correctness of either the proceedings prescribed or the proceedings followed, and that any reasonable or permissible construction which an order gives to its own constitution, laws, or rules will govern unless clearly subversive of personal or property rights, we will consider the material errors raised by the plaintiff upon this appeal.

The contention that the matter was not lawfully before the general committee rests upon the claim that O'Malley could not take an appeal to the general committee. It appears that he was chairman of local division No. 46 and that he had filed a remonstrance against the division's act because it affected his seniority rights. It may be a matter of some doubt or dispute as to whether or not technically he was entitled to appeal. The fact is he did appeal to the general committee. The record was sent to it. It considered that it had jurisdiction. So did all the parties thereto, of which plaintiff was not one. It had jurisdiction of the subject matter, and the only defect, if any, was in the manner in which the matter came before it. Plaintiff in none of the trials before any of the divisions made any claim that the matter was not lawfully before the general committee at the time his interference therein was made. So it must be deemed that since he was not a party to the proceeding and hence not affected by any technical defect in the manner of the appeal, since the parties thereto as well as the general committee considered the matter properly before it, and since he never raised the question below, he cannot now be heard to question the regularity of the appeal. The fact is the matter was actually in the hands of the general committee for adjustment at the time his interference was made, and that is sufficient under the laws of the order. They provide that "any member, including complainant, who by verbal or

written communication to the railroad officials or others interferes with a grievance that is *in the hands of a committee,* shall be expelled when proven guilty." Rationally construed, this must include all grievances actually in the hands of a committee and so considered to be by all parties interested therein.

The claim that division 41 at Blue Island had no jurisdiction to try plaintiff is based upon the provision of sec. 32 of the statutes of the order, quoted in the statement of facts, requiring the president, in case of his setting aside an acquittal, to send the case back to the division having original jurisdiction or to any one of the three divisions nearest to the one having original jurisdiction. It will be remembered that plaintiff was first tried before his own division 46 at Milwaukee, then before division 293 at Chicago. It is admitted that division 41 at Blue Island is not one of the three divisions nearest 46, but is so with reference to division 293, the one at Chicago before which he was last tried.

The defendant bases its right to send the case to division 41 for trial upon the fact that the statutes of the order, as construed by the president, so permit. It will be remembered that the constitution provides that the president shall interpret all laws of the order, subject to appeal to the next session of the grand division. At a session of the meeting of the grand division held in Detroit in 1913, long before plaintiff was tried, President Garretson made the following statement and ruling:

"Sec. 32 of the law provides that, after reviewing the proceedings in any division, the president can set aside or annul any such verdict reached in any trial, and can remand either to the division where the trial was held or to any one of the three nearest divisions. That is done every day in the week, but here is what rises: there have been cases where it was necessary to annul the second time, where it had once been remanded. I will rule that in case of annulling a verdict after it has once been referred to the three nearest divisions, the division where the last trial was held is the one that is within

the intent of the law, as the one three nearest divisions shall be based upon. In other words, any other decision would limit the number of trials that could be held to three. Is there any desire to appeal? Hearing none, it stands as a ruling of the grand division."

The grand division has since made no changes in the president's ruling. It therefore was the law of the order at the time of plaintiff's trial. It is true the construction is perhaps not one that a court familiar with the usual legal meaning of the term "original jurisdiction" would place upon it. But it is a permissible construction and one the scope and effect of which could not be mistaken. It was perhaps prompted by the desire to hasten retrials before divisions further removed from the one in which the grievance or charge arose and so get a more impartial result. But whatever may be the reasons for the construction, being permissible it became the law of the order, just as binding as though the laws had so provided in the first instance without any reference to the term "original jurisdiction." *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 93 N. W. 473. Indeed, the ruling having been made long before plaintiff was tried and having been acquiesced in by the grand division, it had the effect of amending the law to read as the president construed it. So that at the time of the trial the law of the order was that the president could send the case for a second retrial to any one of the three divisions nearest the one the appeal last came from. Such a provision is not unreasonable and must be respected by the courts.

Plaintiff argues he was entitled to appeal to the grand division from the decision of the president annulling his acquittal and sending the case to division 41 for retrial, and bases his claim upon the provisions of sec. 33 of the statutes permitting an appeal to any members "from the decision of any division and, except as provided in sec. 32 of the statutes, from the decision of the president to the grand division." It will be noticed that sec. 32 deals exclusively with trials and

provides explicitly what shall be done in the case of the annulment of an acquittal as well as in the case of the affirmance of a conviction. When an acquittal is annulled the case must be sent to a division for retrial; when a conviction is affirmed the case must be sent to the board of directors and its decision is final. It will therefore be seen that the scheme of the order did not contemplate the review of a *trial* by the grand division. The reasons are palpable when one considers the fact that the order is a very large one, is essentially administrative in its character; that, as the president said, cases for retrial are sent back every day in the week, and that the grand division meets only triennially and is composed of a large number of members. It would be practically impossible for it to pass upon the mass of evidence in such appeal cases accumulating for three years. But, whatever may be the reasons, the order did not see fit to permit an appeal to the grand division from a decision such as the president made in the plaintiff's case, for its laws expressly require that it be sent to a division for retrial, and that is the reason for the exception contained in sec. 33.

It results from this that plaintiff had a trial within the order in accordance with its reasonable laws and regulations, and that the court is without power to reinstate him.

By the Court.—Judgment affirmed.

KERWIN and ROSENBERRY, JJ., took no part.

LAUGHLIN, Appellant, vs. GRISWOLD and others, imp., Respondents.

March 6—April 2, 1919.

Trusts and trustees: Equity: Action to determine rights and duties: Parties: Courts: Jurisdiction: Nonresident defendants: Service of summons by publication: Statute construed.

1. Equity has jurisdiction over all matters relating to trust property, and in the execution and administration of the trust, in

all cases of doubt as to their rights and liabilities and what their conduct should be, trustees are entitled to and should seek instruction and direction from the court.

2. Under a complaint showing that plaintiff as trustee is entitled to the sole or joint possession of trust securities; that he is excluded from physical possession thereof by one of the defendants; that his right to sole possession is challenged by another defendant, who is attempting to act as a co-trustee, claiming to have been appointed, by a third defendant, to be the successor of a deceased co-trustee named in the original deed of trust; and that under said deed of trust plaintiff's legal right to make a required inspection of the trust securities in the absence of his co-trustee, if there is a co-trustee, is uncertain, plaintiff is entitled to an adjudication fixing his rights, duties, and liabilities with reference to the trust property and settling all such controversies in one suit, all persons making claims hostile to his alleged rights in and to the property being made parties.

3. Where, in such a case, the deed of trust defining the rights of the parties is an executory contract relating to personal property easily movable and of a transient situs, and no personal judgment is asked against any one of the defendants, the action is not one over which any court has exclusive jurisdiction, but may be maintained in a court of the state in which the property is located, even though defendants making hostile claims thereto are residents of another state or of different states.

4. Sec. 2639, Stats., authorizes service of the summons by publication in such case upon the defendant who claims the right to appoint a co-trustee and upon the defendant claiming to be such co-trustee, they being residents of another state, a cause of action against them being stated, and the relief demanded consisting in excluding them from an interest which they claim in the personal property, located in this state, constituting the trust estate.

5. Service by publication upon the *cestui que trust* is also authorized, she being a nonresident and having an interest in the property. The purpose of the action by the trustee being to fix the status of the property and the rights and duties of the parties, and the *cestui que trust* being a necessary party, the complaint states a cause of action against her within the meaning of said sec. 2639, Stats., even though it does not seek to deprive her of anything.

APPEAL from an order of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

The appeal is from an order setting aside the service of the summons upon defendants *Emily Griswold, Ellen Griswold,* and *Morris Tucker,* service having been secured pursuant to an order of publication.

It appears from the complaint that on the 31st day of June, 1894, one Joseph L. Griswold by a deed of trust conveyed to *Henry D. Laughlin* and Charles W. Baker, trustees, certain securities consisting of first-mortgage bonds aggregating $40,000, to hold in trust for and during the remainder of the natural life of *Emily A. Griswold,* the interest and income therefrom to be devoted in the manner therein provided to the maintenance and support of said *Emily A. Griswold.* The trustees were directed to keep said bonds at all times in the vault of some safe-deposit company, to be designated by the trustees; the coupons were to be clipped from said bonds and deposited with the defendant Central Safe Deposit & Trust Company, of Cincinnati, for collection, and when collected said Trust Company is required by the terms of the deed of trust to pay $200 per month to *Emily Griswold* so long as she shall live. Said trust deed contains a provision that "The box in which said securities are kept is to be opened only in the presence of both trustees, or by one of them in the presence of said Joseph L. Griswold, but an actual inspection of the trust securities at least once a year is enjoined;" also that "In the event of the death of *Henry D. Laughlin* prior to that of said *Emily A. Griswold,* then said Joseph L. Griswold shall, by an instrument in writing under his hand and seal, and acknowledged before a notary public, appoint his successor in this trust, and the person so appointed shall thereupon succeed to all the rights and obligations, in respect of this trust, granted or imposed by this instrument on said *Laughlin.* In the event of the prior death of said Baker, said *Emily A. Griswold* may nominate his successor, and if acceptable to said Joseph L. Griswold he shall be appointed by the joint instrument of both, executed in the man-

ner above described; otherwise his successor shall not be appointed, but the trust thenceforth administered by the surviving trustee, or his successor." No other provision is made for the appointment of successors to the trustees.

It is further provided that all moneys on hand and still unexpended proceeds of coupons collected as well as the original bonds (except five certain bonds of the value of $5,000 which said *Emily A. Griswold* was empowered to dispose of by her last will and testament) were to be returned to Joseph L. Griswold upon the death of said *Emily A. Griswold,* and that the trustees may dispose of certain of the bonds and reinvest the proceeds in other securities under certain conditions.

On the 25th day of September, 1911, by an appropriate instrument, said Joseph L. Griswold conveyed to his daughter, *Ellen Griswold,* all his right, title, and interest in and to said securities, and directed that his trustees turn over said securities to said *Ellen Griswold* upon the death of *Emily A. Griswold.* Joseph L. Griswold died May 3, 1915; Charles W. Baker, one of the trustees, died April 14, 1917, and thereupon defendant *Ellen Griswold* assumed to appoint *Morris Tucker* as successor to Charles W. Baker.

At the time of the commencement of this action said securities were deposited in a box in the vault of the Wells Building Company, of Milwaukee. The complaint alleges that the said Wells Building Company refuses to allow plaintiff access to said deposit box and to the securities deposited therein, which access is necessary to the plaintiff to enable him to inspect the trust securities as by said trust deed required, and clip the interest coupons therefrom as they become due and payable, and otherwise perform the duties of said trust; that *Morris Tucker* claims the right to act as co-trustee with plaintiff under said deed of trust and claims the right of joint possession of said bonds and securities, which claim the plaintiff refuses to recognize. It is also alleged that the de-

fendant John M. Wood and *Ellen Griswold* are the executors of the will of Joseph L. Griswold, deceased, and as such executors claim the right to said securities.

The complaint demands judgment that the plaintiff be adjudged and decreed to be the sole trustee of said trust and to have the sole possession of the securities belonging to said trust fund; that the defendant Wells Building Company be required to admit plaintiff to its vault and to have access to said securities, and that defendants *Morris Tucker,* John M. Wood, and *Ellen Griswold* be enjoined and restrained from interfering or attempting to interfere with the bonds and securities now deposited in the safe-deposit box in the vault of the defendant Wells Building Company, or interfering with plaintiff's right of possession thereto as trustee under said deed of trust; that the rights and interest of all parties to this action to said trust fund and income therefrom, and the bonds and securities comprising the same, be ascertained and determined by the court, and that plaintiff as such trustee have the judgment and direction of the court as to execution of said trust and the final disposition of said trust fund. Service was made on all defendants except Wells Building Company pursuant to an order of publication. Respondents appeared specially and moved to set aside the service of the summons as to them, resulting in an order setting the service aside and dismissing the action as to them, from which order plaintiff appealed.

For the appellant there was a brief by *Edgar L. Wood* of Milwaukee, attorney, and *Fred B. Silsbee* of Chicago, of counsel, and oral argument by *Mr. Wood.*

For the respondents there was a brief by *Lawrence A. Olwell* of Milwaukee, attorney (on special appearance), and *Morris Tucker* of St. Louis, Missouri, of counsel, and oral argument by *Mr. Olwell.*

OWEN, J. Respondents insist that plaintiff's quarrel is entirely with the Wells Building Company and involves sim-

ply his right of possession of the trust securities which is denied him by that defendant; that as to that defendant he has a complete remedy at law; that no cause of action is stated against respondents; that they have no property in this state, which is a prerequisite to service of summons by publication, for which reasons the circuit court acquired no jurisdiction of them and the service of summons was properly set aside. This is not a broad view of the situation and its adoption would not give impetus to the wholesome tendency of courts to dispose of all controversies between parties or relating to one subject matter in one action.

The complaint shows this situation: The property sought to be recovered is trust property. Plaintiff is entitled to the sole or joint possession thereof. He is excluded from its physical possession by the Wells Building Company. His right to the sole possession is challenged by defendant *Morris Tucker,* who claims to be co-trustee by virtue of his appointment thereto by defendant *Ellen Griswold* to succeed Charles W. Baker, co-trustee under the original deed of trust, now deceased. The deed of trust provides:

"The box in which said securities are kept is to be opened only in the presence of both trustees, or by one of them in the presence of said Joseph L. Griswold, but an actual inspection of the trust securities at least once a year is enjoined."

Should the interference of the Wells Building Company with plaintiff's physical possession of the securities be removed, his legal right to make the inspection in the absence of *Tucker,* who claims to be co-trustee, would be uncertain. As trustee he is entitled to an adjudication by a court of equity fixing his rights, duties, and liabilities with reference to this trust property, and, in accordance with the settled policy of this jurisdiction, to dispose of all such controversies in one suit. All parties making claims hostile to his rights in and to the property as he alleges them to be should be made parties to such an action.

The complaint alleges that the defendant *Ellen Griswold*

claims the right and has assumed to appoint defendant *Morris Tucker* as co-trustee in place of Charles W. Baker, deceased, and that said *Tucker* "now claims the right to act as such trustee under said deed of trust, jointly with the plaintiff, and is attempting to so act and has demanded of the plaintiff that the plaintiff recognize and treat the said defendant as such co-trustee under said deed of trust, and that he be permitted to have the possession and control of said bonds and securities, jointly with the plaintiff, and access to said deposit box, which demand the plaintiff has refused. . . ." The plaintiff, who is endeavoring in good faith to discharge the duties which he has assumed under the deed of trust, should not be left to decide the question of *Tucker's* right to act as co-trustee, at his own peril and at the risk of becoming a wrongdoer. Equity has jurisdiction over all matters relating to trust property, and in the execution and administration of the trust, in all cases of doubt as to their rights and liabilities and what their conduct should be, trustees are entitled to and should seek instruction and direction from the court. 2 Perry, Trusts (4th ed.) § 476*a;* Hill, Trustees (4th Am. ed.) 843; *Stephenson v. Norris,* 128 Wis. 242, 107 N. W. 343.

The deed of trust, which defines the rights of the parties, is an executory contract relating to personal property of an easily movable nature and of a transient situs. No personal judgment is asked against any of the defendants. It is not an action over which any court has exclusive jurisdiction. No reason is perceived why a court having jurisdiction over the property is not an appropriate forum in which to maintain the action. Although respondents are all residents of Missouri, it may well happen that parties similarly situated be residents of different states, in which case jurisdiction by any court except one having jurisdiction of the property would be difficult, if not impossible, of attainment.

It only remains to be considered whether the statute au-

thorizes service by publication on respondents. Sec. 2639 provides:

"Service of the summons may be made without the state or by publication upon a defendant against whom a cause of action appears to exist, . . . on obtaining an order therefor as provided in the next following section, in either of the following cases: . . . (3) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein."

The situation as to respondents *Ellen Griswold* and *Morris Tucker* comes squarely within the terms of the statute. The complaint states a cause of action against them, that is, it asserts that they are claiming rights inimical to those of the plaintiff, and which the plaintiff has a right to have settled to the end that the trust estate may be orderly and lawfully administered. *Morris Tucker* claims the right to act as co-trustee under his appointment by *Ellen Griswold,* and *Ellen Griswold* claims the right to appoint a co-trustee. By their claims, therefore, they claim an interest in the personal property constituting the trust estate, and the relief demanded consists in excluding them therefrom. We see no room to contend that the statute does not provide for service of the summons on them by publication thereof. This may not be so clear as to *Emily Griswold,* but to our minds it is just as certain. She responds to the call of the statute requiring that she have an interest in the property. True, it is not sought to exclude her from that interest, but the statute is in the disjunctive. It is not necessary that she have an interest her exclusion from which is a part of the relief sought. If she have an interest, the requirements of sub. (3) are met. Does the complaint state a cause of action against her? It does not in the ordinary sense. It does not seek to deprive her of anything. But this is an action brought by her trustee to have his duties determined. It is not necessarily an

adverse proceeding, its purpose being to declare the status of the property and fix the rights and duties of the parties. It is generally held that in such an action all *cestuis que trustent* are necessary parties. Hill, Trustees (4th Am. ed.) 845. In this sense it does state a cause of action against her. The service by publication on respondents was authorized by and pursuant to the statute, and should not have been set aside.

By the Court.—Order appealed from reversed, and cause remanded for further proceedings according to law.

KERWIN and ROSENBERRY, JJ., took no part.

ESTATE OF GILLEN: CLAUSEN, Respondent, vs. GILLEN, Administrator, Appellant.

March 6—April 2, 1919.

Claims against decedents: Presentation: Time limited: Allowance: Promissory notes: Counterclaim and judgment thereon in federal court: Evidence.

1. A claim against a decedent, based on notes given by him, was seasonably presented to the county court. The administrator objected to it on the ground that an action by the decedent involving the notes was pending in a federal court and, upon leave, had such action revived in his name. Subsequently, after the time limited for filing claims against the decedent, the claimant filed an amended answer in the federal court in which, for the first time, he set up the notes as a counterclaim. Judgment in that court was rendered against the administrator on the notes, and thereafter the county court, without further proof than a copy of that judgment, allowed the claim at the amount fixed by the judgment. *Held,* that the claim, being upon the notes and not upon the judgment and having been duly filed, never became barred.
2. The claim on the notes, not being barred, was properly interposed as a counterclaim in the federal court after the revival of the action.
3. The judgment in the federal court was conclusive proof as to the validity of the notes and the amount due thereon.
4. Such judgment was not a new or independent claim to be allowed in the county court, but was merely an evidentiary fact in support of the original claim on the notes. *Fields v. Estate of Mundy,* 106 Wis. 383, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court affirming an order of the county court allowing a claim against the estate of Frederick C. Gillen, deceased.

The facts are simple. Frederick C. Gillen in March and April, 1915, executed and delivered to the claimant certain notes aggregating over $3,800. In May following he commenced an action in the United States district court at Chicago against *Clausen* and others to obtain the cancellation of the notes and the surrender of certain collaterals which accompanied the notes, on the ground that he was induced to execute and deliver the same by fraud, and obtained an injunctional order restraining the transfer of the collateral. The defendants answered denying the fraud, and before the case came to trial and on September 3, 1915, Frederick C. Gillen died. His estate was probated in the Milwaukee county court, the appellant was appointed and duly qualified as administrator, and an order was made limiting the time for filing of claims to May 1, 1916. On February 4, 1916, *Clausen* filed his claim setting forth the notes aforesaid, to which the administrator afterwards filed objections on the ground of the pendency of the action in the federal court "involving this account." In April, 1916, the administrator obtained leave of the county court to revive the Chicago action and prosecute the same, pursuant to which order he was substituted as plaintiff in that action, and on November 28, 1916, *Clausen* filed an amended answer in said action, setting up as a counterclaim for the first time the notes aforesaid. February 1, 1917, said action came on for trial, and on the plaintiff's motion his bill of complaint was dismissed and the cause came on for trial on the counterclaim. The defendant introduced his proofs and judgment was rendered against the administrator for the full amount of the notes and interest, the same to be paid in the due course of the administration of the estate. Thereafter the claimant ob-

tained leave of the county court of Milwaukee county to amend his claim, setting up the said judgment and attaching a duly authenticated copy of the judgment. The amendment was allowed, and the court allowed the claim at the same amount as allowed by the Chicago court without further proof except the aforesaid copy of the Chicago judgment. Thereupon the administrator appealed to the circuit court, which affirmed the order of allowance.

For the appellant there was a brief by *Rix & Barney,* attorneys, and *David A. Sondel,* of counsel, all of Milwaukee, and oral argument by *Carl B. Rix.*

L. M. Jeger, attorney, and *Andrew Hummeland,* of counsel, both of Milwaukee, for the respondent.

WINSLOW, C. J. The appellant's contention is that the respondent's claim was barred by sec. 3844, Stats., which bars every claim against a deceased person not presented to the court within the time limited for that purpose. The argument is that the time limited by the probate court was May 1, 1916, and that the counterclaim on the notes in the Chicago action was not interposed until November 16th, consequently it was barred by the statute, and no judgment thereafter rendered could constitute a claim proper to be allowed in the probate court in this state. In support of this position reliance is placed on *Fields v. Estate of Mundy,* 106 Wis. 383, 82 N. W. 343.

The contention must fail for these plain reasons:

1. The claim is upon the notes, not upon the judgment. This claim was confessedly filed in the probate court within the time limited by law and hence never became barred.

2. The claim on the notes not being barred, it could properly be interposed as a counterclaim in the action in the federal court after the administrator had revived such action. Sec. 3847, Stats. In fact, the new equity rules of the federal courts *require* that it should be so presented. Rule 30, 3 Foster, Fed. Prac. (5th ed.) p. 2867.

3. The judgment rendered in that action settled the rights of the parties as to the matters litigated therein and thus became conclusive proof as to the validity of the notes and the amount due thereon.

4. The judgment was not a new or independent claim, but simply an evidentiary fact in support of the original claim on the notes which had been filed in due time, hence such decisions as *Fields v. Estate of Mundy, supra,* have no application.

By the Court.—Judgment affirmed.

KERWIN and ROSENBERRY, JJ., took no part.

RICHTER, Appellant, vs. LUKASZEWICZ, Respondent.

March 6—April 2, 1919.

Appeal from Milwaukee civil court: Time for making return: Supplemental return: Statutes to be liberally construed: When complete return impossible: When appeal may be taken.

1. Sec. 3763, Stats. (relating to justices' courts, but applicable also to the Milwaukee civil court), providing that upon an appeal the return of the testimony, proceedings, etc., to the appellate court shall be made after ten days and within thirty days after the appeal shall have been perfected, is directory only, and the return may be made after said thirty days.
2. If such return be defective the appellate court may, in its discretion, direct a supplemental return to be made.
3. Where the appealing party has done all within his power, the appellate court will afford him an opportunity to perfect his appeal rather than dismiss it, the statutes in such case being liberally construed in order to preserve the remedy by appeal.
4. Where the clerk of the Milwaukee civil court was unable to make a return upon appeal as provided in sec. 3763, Stats., because the stenographer who took the testimony had entered the military service of the United States and no one had been found who could read his notes and transcribe the testimony, the appellate court, instead of dismissing the appeal, should have directed said clerk to make a return of the record as it then was, certifying the reasons why it was incomplete, and should then have held the case until a transcript of the testimony could be furnished or some other disposition made.

5. A judgment of the Milwaukee civil court which provides for costs, to be effective so that it may be the subject of an appeal, must be perfected by the taxation and insertion of such costs or by the expiration of the period of sixty days under sec. 2894*a*, Stats., within which costs may be taxed and inserted.
6. Thus where an order for judgment in defendant's favor was signed on June 19th and on August 20th defendant attempted to tax his costs, but such taxation was disallowed, apparently because more than sixty days had elapsed, a notice of appeal from said judgment filed on September 7th was within the time limited for the taking of an appeal.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

On March 29, 1917, in an action in the civil court involving, apparently, more than $200 in both complaint and counterclaim, a verdict was found in defendant's favor upon his counterclaim, for $64.06 damages. On May 28th judgment on the verdict in favor of defendant was ordered, and on June 19th the judge signed an order for such judgment and apparently judgment was then entered. August 20th an attempt was made by defendant to tax costs, and such taxation was disallowed, apparently because at a time more than sixty days after June 19th. On September 7th an appeal to the circuit court in the usual form was taken by plaintiff, who then paid to the clerk of the civil court the required fees, together with a deposit to apply on payment for the testimony when transcribed.

No return was made by the clerk of the civil court, and on August 5, 1918, upon motion by defendant the plaintiff's appeal was dismissed. From such order the plaintiff has appealed.

W. C. Seefeld of Milwaukee, for the appellant.

For the respondent there was a brief by *A. B. Rosenthal* and *Churchill, Bennett & Churchill,* all of Milwaukee, and oral argument by *Mr. Rosenthal.*

ESCHWEILER, J. It appears from the affidavits filed in the circuit court by the respective attorneys, together with that of the clerk of the civil court, that the reporter who took the testimony had been a member of the Wisconsin National Guard and some time prior to September 7th had been called to service in the army of the United States; that efforts had been made by such clerk and the judge of the civil court to have such reporter released from such service sufficiently long to write out the transcript of the testimony in this and other cases, but that such efforts were unavailing; that it had not been possible to find any person sufficiently familiar with the notes of such absent reporter to transcribe them, and for the only reason that such notes had not been transcribed the clerk had not complied with the provisions of sec. 3763, Stats., which require him, after ten days and within thirty days after the perfecting of such appeal, to make his return, which shall include the testimony, to the appellate court.

Under this section it is also provided that if a return be defective the appellate court may direct further or amended returns.

This statute has been held directory and not mandatory, and such a return can be made after the time therein designated. *Norden v. Jones,* 33 Wis. 600, 603. The requiring of a supplemental return rests in the sound discretion of the appellate court. *Crate v. Pettepher,* 112 Wis. 252, 254, 87 N. W. 1104.

We see no reason why the same rule should not apply to the appeal in this case as has heretofore been held in appeals from other courts, namely, that where the appealing party has done all that is within his power the appellate court will afford him an opportunity to perfect that appeal rather than dismiss it. *Hanley v. Kraftczyk,* 119 Wis. 352, 357, 96 N. W. 820; *Oconto L. Co. v. Mosling,* 122 Wis. 440, 444, 100 N. W. 824.

A liberal construction should be given to such statutes in order to preserve the remedy of appeal. *Liesner v. Wanie,* 156 Wis. 16, 19, 145 N. W. 374.

The circuit court, therefore, instead of dismissing the appeal should rather have directed a return to be made by the clerk of the civil court of the record as it then was, certifying the reasons why the same was incomplete, and then upon such return being filed the circuit court could, in a reasonable exercise of discretion, hold the case until such transcript could be furnished or some other disposition made.

The respondent presents here as a ground why the appeal was properly dismissed a reason not suggested in the court below and to the effect that the judgment of the civil court must be considered as entered on June 19th, when an order for such judgment was made, and on which day, according to the affidavit of defendant's counsel, "judgment was entered in favor of defendant and against plaintiff," and that therefore, more than sixty days, even, having elapsed between that time and September 7th, when the appeal was taken, such appeal was too late and futile.

A judgment which provides for costs, to be effective so that it may be the subject of an appeal, must be perfected by the taxation and insertion of such costs or by the expiration of the period of sixty days under sec. 2894*a,* Stats., within which costs may be taxed and inserted. Until such period arrives an appeal from the civil court cannot properly be taken. *Moudry v. Patrick Cudahy F. Co.* 164 Wis. 510, 159 N. W. 750. See, also, *Wheeler v. Russell,* 93 Wis. 135, 139, 67 N. W. 43; *Joint School Dist. v. Kemen,* 68 Wis. 246, 247, 32 N. W. 42; *Kelly v. Owen,* 63 Wis. 351, 352, 23 N. W. 583.

By the Court.—Order reversed.

KERWIN and ROSENBERRY, JJ., took no part.

STEHLIK, Administratrix, Respondent, vs. MILWAUKEE TYPOGRAPHICAL UNION No. 23, Appellant.

March 6—April 2, 1919.

Insurance: Benefit societies: Membership in good standing: Non-payment of dues: Waiver: Estoppel.

Under the by-laws of a subordinate typographical union a death benefit was payable to heirs upon the death of a member *in good standing,* but a member was in good standing only when his dues for the current month were paid. The general laws of the order provided that a member should stand suspended when four months in arrears for dues. A member had once or twice been more than four months in arrears, but, before it was necessary for the local secretary to report that fact, had paid sufficient dues to maintain his membership, and the report was not made. He had usually been from two to three months, and at the time of his death was two months, in arrears. The local officers were bound to accept dues tendered by a member not in suspension, even though he was in arrears. *Held,* that no death benefit was payable. His mere membership in the order was not enough to give his heirs any right to such benefit; and, even if there had been a waiver of the laws which automatically operated to suspend him as a member of the order, there had been no conduct which in any way estopped the local union to deny that he was in good standing. *Ramsey v. Travelers' P. Asso.* 147 Wis. 405, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

This action was brought in the civil court of Milwaukee county by the plaintiff as administratrix of the estate of Frank Kuehnl against the *Milwaukee Typographical Union No. 23* to recover a death benefit of $300.

Plaintiff recovered in the civil court, defendant appealed to the circuit court, where the judgment was affirmed, and from the judgment of the circuit court defendant brings this appeal.

For the appellant there was a brief by *Rubin, Fawcett &*

Dutcher, attorneys, and *A. W. Richter,* of counsel, all of Milwaukee, and oral argument by *Charles B. Rubin.*

J. J. Vlach of Milwaukee, for the respondent.

OWEN, J. Plaintiff's deceased, who died on July 5, 1915, was a member of *Milwaukee Typographical Union No. 23,* which is a local branch of the International Typographical Union of North America and is composed of men in the printing and kindred trades.

It is a typical labor union, the principal objects and purposes of which are the betterment of its members in the way of wages, hours, and conditions of labor, etc., and as an incident of the organization it is provided by the by-laws of the local union that upon the death of a member in good standing the sum of $300 shall be paid to his legal heirs within thirty days after death. A member is in good standing only when his monthly dues for the current month are paid. When his dues are paid he is given a *per capita* stamp for the current month, which is affixed to his working card. It is also provided by the general laws of the order that members of subordinate unions shall stand suspended when four months in arrears for local or international dues or assessments. As a condition for reinstatement, all local and international typographical union dues and assessments due at the time of suspension, together with such international *per capita* tax and assessment as would have accrued at the time of reinstatement, must be paid, together with a reinstatement fee of $5. Deceased was continually in arrears on his dues. He seldom if ever had them paid so as to be in good standing in the union. On one or two occasions he was more than four months in arrears, and if the laws of the order had been strictly enforced by the secretary of the local union to whom he paid his dues he would have been automatically suspended. On such occasions, however, before it was necessary for the local secretary to make a report to the international union, deceased paid sufficient dues to main-

tain his membership in the order and the local secretary did not report him as suspended. As a rule, however, deceased was from two to three months in arrears on his dues. At the time of his death he was two months in arrears. Two days after his death his dues were tendered to the local secretary and accepted conditionally by him, but the fact of that payment with the conditional acceptance is not urged here as in and of itself entitling plaintiff to recover.

It is plaintiff's contention that the defendant has waived the right to object to the payment of the $300 benefit fund by reason of such course of dealing with the deceased in permitting him to pay his dues in the manner above indicated, invoking the rule stated in *Ramsey v. Travelers' P. Asso.* 147 Wis. 405, 133 N. W. 634, and many other cases, that

"Where the conduct of an insurance company with reference to strict observance on the part of the assured of the agreement as to payment of dues, or payment in the particular manner stipulated, is such as, naturally to, and that it in fact does, cause the assured to believe that such performance will not be insisted upon, but that variances therefrom, within the limitations suggested by such conduct, will be regarded by the company as sufficient performance to preserve the integrity of the agreement,—it will be conclusively presumed that the minds of the parties met upon that basis, displacing, to that extent, the letter of the contract; this upon the equitable doctrine of estoppel *in pais.*"

If plaintiff's right to recovery depended upon the question of whether deceased were a member of the order it might be necessary to consider whether the principle just quoted is applicable in view of the fact that the local secretary, by his conduct on the few occasions, waived those provisions of the constitution and by-laws of the order which automatically operated to suspend him as a member thereof. However, his mere membership in the order is not sufficient to entitle his legal representatives to this benefit fund. It is plainly provided that said benefit fund shall be paid to the legal heirs of those who at the time of death were in good standing, and

we are referred to no conduct on the part of the defendant or any of its officers which in any way estops it to deny that deceased was in good standing. Defendant and its officers were under obligations to accept the payment of his dues at the times they were tendered. Deceased had a right to be in arrears on his dues if he saw fit. In other words, he had a right to perpetuate his membership in the order by making payment of his dues in time to prevent his automatic suspension and defendant could not refuse to accept the dues at such times. The principle relied upon by the plaintiff above referred to is not applicable here because there was no course of dealing between deceased and defendant leading him to believe that he could maintain his good standing in the union in any other manner than that provided by the by-laws of the union, which required his dues to be paid for the current month. It follows that the judgment of the civil court should have been reversed and that the circuit court erred in affirming it.

By the Court.—Judgment reversed, and the cause remanded for further proceedings according to law.

KERWIN and ROSENBERRY, JJ., took no part.

STEVENS, Respondent, vs. FREUND and another, Appellants.

March 6—April 2, 1919.

Negotiable instruments: Collateral security: Holder in due course: Note given as part of wagering transaction: Trade-increasing contest: Guaranty of results.

1. Where a promissory note was duly transferred as collateral security to an innocent holder for value in due course, one who thereafter purchased it and the debt secured thereby from such holder became, if not himself a party to any fraud or illegality affecting the instrument, entitled to all the rights of said holder in due course; and except in the cases mentioned in sec. 1676—27, Stats., the defense that the note was originally obtained by fraud is not available as against him.

[2. Whether, under sec. 1676—27, Stats., the defense that a note was given as a part of a gambling or wagering transaction is available as against a holder in due course, not decided.]

3. A contract by which defendants agreed to enter upon a trade-increasing contest for which the prizes, plans, and advertising matter were to be furnished by one P., and to pay him $298 therefor, and he guaranteed that their sales of goods for the next year's business should equal a certain sum and that if 0.75 per cent. of such sales did not amount to $298 he would pay the deficiency in cash, was not illegal or void under sec. 4538, Stats., as being a gambling or wagering transaction; and a note given by defendants to P. for said $298 was therefore valid and enforceable by a holder in due course.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action upon a promissory note executed by the defendants to the order of the Lyon–Taylor Company. The defense was that the note was obtained by fraud and was void because given as a part of a gambling transaction. The action was tried by the court without a jury and the trial court found against the defendants as to both defenses. The facts were in brief as follows: In March, 1914, the defendants were conducting a general mercantile business at New Holstein, Calumet county, Wisconsin, and one M. F. Price, under the trade-name of Lyon–Taylor Company, was doing business at Iowa City, Iowa, introducing so-called trade-increasing contests. Price's agent came to New Holstein and induced the defendants to enter on a trade-increasing contest, the prizes, plans, and advertising matter to be furnished by Price. A written contract was entered into by which Price agreed to furnish to the defendants the prizes, consisting of certain plated silverware and tickets for railroad tours, also all advertising matter, bulletins, rules for the contest, etc., and the defendants agreed to stage a contest among their patrons under the rules and instructions furnished them, and as a part of their agreement the note in suit for $298 was given in payment for the prizes, printed matter, and assistance of Price. The contest was in brief a voting

contest; every purchaser of goods to a certain amount received votes which he could cast for the young lady whom he deemed most deserving, and at the close of the contest the prizes were to be awarded in accordance with the published rules by an impartial board, the chief prize going to the contestant having the most votes, and so on down the list. Price also agreed to give a bond of $500 to cover his part of the agreement (which bond was in fact given), and guaranteed that the defendants' sales of goods for the next year's business should equal $40,000, and that if 0.75 per cent. of said year's sales did not amount to $298 he would pay to the defendants the deficiency in cash.

The note in question was attached to the contract, but the agreement provided that Price should detach it and accept it in full settlement for the goods and printed matter and his expense in assisting and instructing the defendants as to the plan.

The defendants started the contest but abandoned it. Price detached and indorsed the note before due to the First National Bank of Iowa City, with other notes, as collateral security for money loaned by the bank to Price. The plaintiff afterwards purchased of the bank Price's notes and the collaterals, including the note in suit, and Price's notes are still unpaid. The defendants appeal from judgment for the plaintiff upon the note.

The cause was submitted for the appellants on the brief of *J. E. McMullen* of Chilton, and for the respondent on that of *L. P. Fox* of Chilton.

WINSLOW, C. J. The note in question passed into the hands of an innocent holder for value in due course before due and was transferred by that holder to the plaintiff. There is no evidence that the plaintiff was a party to any fraud or illegality affecting the instrument, and hence, under the express terms of the negotiable instrument law, he pos-

sesses all the rights of the holder in due course. Secs. 1676—22 and 1676—28, Stats.

A holder in due course holds the instrument "free from any defect of title of prior parties, and free from any defenses available to prior parties among themselves, . . . except as provided in sections 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provision of section 1676—25 of this act." Sec. 1676—27, Stats.

This section entirely cuts off the defense of fraud, so that it becomes unnecessary to consider it. The defendants, however, claim that the note was an integral part of a gambling or wagering transaction and hence was void under sec. 4538, Stats., which makes absolutely void all contracts or notes given for money wagered or staked on the result of a game under any name whatsoever.

It is argued that the provision of the contract by which Price agreed that if 0.75 per cent. of the year's sales did not amount to $298 he (Price) would pay the deficiency in cash, amounts to a bet or wager and is within the prohibition of the gaming statute.

We are unable to agree with this contention. The agreement is unusual, certainly, but in our judgment not immoral or illegal. In effect it is simply a guaranty that the defendants' business will be increased to a certain figure if they will purchase the prizes and advertising matter and adopt the trade-increasing program offered by Price, coupled with an agreement that, if the increase does not take place, Price will take a less sum for the prizes, advertising matter, and services furnished by him.

The question whether this latter defense would be of any avail as against a holder in due course seems doubtful under the provisions of sec. 1676—27, Stats., above quoted. *Arnd v. Sjoblom,* 131 Wis. 642, 111 N. W. 666. It is un-

necessary, however, to pass upon that question in this case, and we express no opinion on it.

By the Court.—Judgment affirmed.

KERWIN and ROSENBERRY, JJ., took no part.

MCVEY, Plaintiff in error, vs. THE STATE, Defendant in error.

March 7—April 2, 1919.

Criminal law: Failure to submit special issue as to insanity: Writ of error: Record.

1. Where the record before this court contains nothing to indicate that, either before or at his trial, the defendant or his counsel had made any claim that he was insane at the time of the commission of the alleged offense, or that the trial court had any reason to suspect that such was the fact, it cannot be held that it was error not to submit to the jury a special issue as to insanity, under sec. 4697, Stats.
2. An affidavit of counsel for defendant in such a case stating that before the trial he filed a plea of insanity with the clerk, which affidavit was not made a part of the record, cannot be considered in the appellate court.

ERROR to review a judgment and the record of the municipal court of Brown county: N. J. MONAHAN, Judge. *Affirmed.*

The writ was obtained to secure a new trial for *Hugh McVey* under the provisions of sec. 4719, Stats., after judgment and motion made within a year after the trial of the case. *McVey* was arrested November 24, 1916, charged with assault with intent to murder. He was given a preliminary hearing and bound over for trial. No plea of insanity of *McVey* was regularly interposed in the trial court. A paper was prepared by the clerk of the court at the request of counsel for *McVey* and marked by the clerk as filed, but nothing appears in the proceedings or the records of the

court or clerk to show that such plea was brought to the court's attention or relied on at the trial. No evidence was offered by defendant in support of the plea of insanity. The defendant was found guilty and sentenced to the state prison at Waupun at hard labor for a term of twenty years.

Shortly before the expiration of the year within which a writ of error could be issued to review the trial court's action, new counsel was secured for *McVey*. The district attorney was in the hospital, and while there a representative of the new counsel informed him that it was the intention of the attorneys for *McVey* to have the record of the trial court reviewed and that they desired also to make a motion for a new trial. On account of the district attorney's sickness it was agreed that if a writ of error be issued and motion for a new trial could be filed it might be argued and decided later with the same force and effect as if argued and decided prior to the expiration of one year. Accordingly a writ of error was issued from the supreme court. Motion for a new trial was filed and served, but was not argued nor decided until after the expiration of one year.

The trial court held that the stipulation extending the time in which the motion for a new trial could be heard and decided was of no effect under the law. No bill of exceptions could be settled, as the court had no authority nor control over its record beyond the year.

The plaintiff in error claims that the failure of the trial court to submit the issue of defendant's insanity to the jury constitutes reversible error in the case.

For the plaintiff in error there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald F. Clifford,* all of Green Bay.

For the defendant in error there was a brief signed by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Wm. B. Surplice,* assistant district attorney of Brown county.

SIEBECKER, J. Upon the record before this court there is but one question presented for review, namely: Did the court err in not submitting to the jury the inquiry whether or not the defendant was insane at the time of the commission of the offense with which he was charged, as provided by sec. 4697, Stats.? The provisions of this section pertinent to this inquiry are:

"When any person is indicted or informed against for any offense and such person or counsel in his behalf shall, at the time and before the commencement of the trial, claim or pretend that such person, at the time of the commission of such alleged offense, was insane or feeble-minded and for that reason not responsible for his acts, the court shall order a special plea, setting up and alleging such insanity, or feeble-mindedness, to be filed on his behalf with the plea of not guilty; and the special issue thereby made shall be tried and determined by the jury with the plea of not guilty; . . ."

The record of the proceedings in the case on the trial contains nothing to indicate that the defendant or his counsel, before or at the trial, claimed or pretended that defendant was insane and for that reason not responsible for his acts. The minutes of the trial court show that no special plea of insanity was interposed by defendant or his attorney. The paper among the files of the court setting forth such a plea and bearing a file-mark of the clerk of the court had not been seen by defendant or the court, nor had it been submitted by defendant or his counsel for filing, but was so left with the files through the mistake of the clerk, who had prepared it for defendant's counsel to be used by him if a plea of defendant's insanity was to be interposed. Nor is there anything in the record tending to show that the court had any reason to suspect that defendant at the time of the commission of the alleged offense was insane and therefore not responsible for his acts. The affidavit of the counsel is not part of the record of the proceedings of the court and cannot be considered in the case. The record fails to disclose any error of the trial court in failing to submit the special issue

of defendant's insanity to the jury and the judgment entered in the case must stand.

By the Court.—The judgment is affirmed.

KERWIN and ROSENBERRY, JJ., took no part.

BIANCHI and others, Plaintiffs in error, vs. THE STATE, Defendant in error.

March 7—April 2, 1919.

Criminal law and practice: Assault with intent to murder: Conspiracy: Evidence: Competency: Sufficiency: Reversal of conviction: Discharge of defendants sufficiently punished: Harmless errors: Arguments to jury: Attitude of trial judge: Milwaukee district court: Powers of clerk: Warrants: Information: Change of venue: Discretion: Constitutional law: Self-incrimination: Sworn examination of accused persons by district attorney: Instructions to jury.

1. Upon the trial of several persons for an assault with intent to murder, a conspiracy on the part of all to make the assault may be shown. If such conspiracy is established it becomes a matter of secondary importance just what part each defendant took in carrying it out; but if it is not established, and there was no concert of action agreed upon or understood before the assault began, it is of the utmost importance to determine just what each defendant said and did at the time of the assault.
2. In proving a conspiracy great latitude in the admission of evidence is permissible, and the limits thereof rest largely in the discretion of the trial court.
3. Upon the question of conspiracy evidence that some, if not all, of the defendants belonged to the same club or circle or home and as to its character is admissible; but proof that defendants were anarchists, or even that they were guilty of criminal anarchy, is not sufficient of itself to prove a conspiracy to murder.
4. If in such a case the proof of conspiracy failed, letters written by one defendant showing an intent on his part and that of others to disturb the meeting at which the assault occurred were admissible in evidence only against the writer.
5. Although defendants or some of them entertained the thought of disturbing such meeting, the execution of that thought

would be only a misdemeanor, and those joining in it could not on that ground be convicted of an assault with intent to murder unless the disturbance contemplated would probably lead to such an assault.

6. The evidence in this case is *held* insufficient to establish a conspiracy to murder; insufficient as to some of the defendants to show that they took part at any time in any assault whatever; insufficient as to others to warrant a conviction of anything more than a simple assault; and sufficient as to others to warrant, in the absence of prejudicial error on the trial, their conviction of an assault with intent to murder.
7. The evidence as to certain defendants having been sufficient to warrant conviction of a minor offense only, and they having been in fact convicted of a graver charge and imprisoned under harsher conditions and for a much longer time than they could have been had they been convicted of the lesser offense, it is *held* that they have been sufficiently punished, and upon reversal of the judgment against them their discharge is directed.
8. Alleged errors as to remarks of counsel for the state in his argument to the jury, as to restrictions upon the cross-examination of witnesses for the state, and as to the attitude of the judge towards defendants' counsel during the trial, are *held* not to have been prejudicial.
9. The clerk of the Milwaukee district court is authorized by sec. 9, ch. 218, Laws 1899, to issue warrants upon complaint filed in writing; and it is not necessary that the record show that the complainant was orally examined under oath, the calls of sec. 4776, Stats., being satisfied by a sworn complaint in writing.
10. Under sec. 4653, Stats., an information may be filed for an offense different from that charged in the complaint upon which a warrant was issued.
11. Four days before the time set for the trial in Milwaukee of persons charged with an assault with intent to murder, a bomb explosion in the central police station killed a number of persons, including two officers who had assisted in the arrest of the defendants at the time of the alleged assault. The newspapers of the city, which circulated generally throughout the state, charged the explosion, if not directly to the defendants (who were in jail), to their friends or nationality. A change of venue, asked on the ground that a fair trial could not be had in Milwaukee county, was refused conditionally. The request was not renewed upon going to trial, and a jury was quickly and easily secured.

Held, that there was no abuse of discretion in refusing the change.

12. The apparent difficulty or ease of securing a jury may be taken into account in passing upon an alleged abuse of discretion in refusing a change of venue.

13. Transcripts of the testimony of police officers since deceased, taken at the preliminary examinations of defendants, were admissible in evidence at the trial, being received in each instance, as the trial court specifically stated, only as against those defendants at whose preliminary examination the offered testimony was taken; and a subsequent statement in the charge to the jury that such testimony could be considered only as against such defendants "as were present" at the times of such preliminary examinations was not, under the circumstances, misleading.

14. Where certain of the defendants charged with an assault with intent to murder had been taken to the office of the district attorney and, without being advised of their constitutional rights as to self-incrimination, were sworn and examined by him, and their testimony reduced to writing, such proceeding was improper and illegal and such testimony, not having been voluntarily given, was inadmissible at the trial.

15. No damaging facts as to the assault in question being contained in the statements, so taken, of two of the defendants, and it being shown by other evidence, clearly and satisfactorily, that they were active participants in the assault, the admission of their statements was not prejudicial error as to them.

16. Upon a trial for assault with intent to murder, the evidence being insufficient to show a conspiracy and insufficient to show any offense by some of the defendants or more than a simple assault by others, it was error to give instructions to the jury relating to a conspiracy to commit a felony or relating to criminal anarchy as defined in the statutes. As to defendants whose active and deadly participation in the assault was clearly proved the error was harmless; but as to others, against whom the evidence was somewhat meager and uncertain, the error was prejudicial.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed in part; reversed in part.*

The plaintiffs in error, hereinafter called the defendants, *Peter Bianchi, Vincent Fratesi, Amedeo Lilli, Adolph Fra-*

tesi, Louis Serafini, Angelo Pantaleoni, Gavina Denurra, Daniel Belucci, Pasquale Nardini, Mary Nardini, and *Bartolo Testolin,* were each charged with and convicted of the crime of an assault, being armed with a loaded revolver, with intent to murder, and each was sentenced for a term of twenty-five years in state prison. All the above defendants except *Vincent Fratesi* and *Amedeo Lilli* were also charged with being accessories before the fact of the same offense, in that they unlawfully and feloniously counseled, aided, abetted, and procured *Vincent Fratesi* and *Amedeo Lilli* to commit the assault charged.

It appears from the evidence that on Sunday, August 26, 1917, at about half-past 3 in the afternoon, one August Guliani, a minister, having obtained police permission so to do, held a meeting at the corner of Bishop and Potter avenues in the city of Milwaukee. He had with him part of his own congregation. Two cornets and an organ were played at the meeting. They first played "Columbia" on the cornet and that attracted a crowd of about 100. Among those who came were some of the defendants. Guliani testified that *Mary Nardini, Vincent Fratesi, Amedeo Lilli, Adolph Fratesi, Bartolo Testolin,* and *Gavina Denurra* were there, but he cannot say that he saw any other of the defendants there that afternoon. Those that he saw were standing close together in a group by themselves. After "Columbia" was played the minister started to talk about the war, the draft, and registration, and talked for about ten minutes, when *Gavina Denurra* began to talk aloud and said, "I don't believe in God, I don't believe in priests, I don't believe in government, I don't believe in what you are saying," and every one of the group said "Yes, yes, yes," according to Guliani's testimony. He then asked them to be quiet till the meeting was over and then if they had any questions to ask he would answer them. They were quiet till the meeting was over and then they came around him and started to talk.

Amedeo Lilli was the first to speak and he said, "We don't believe in this war," and then there was another man, not a defendant, who said, "You came here because you want to preach about the war, we don't believe in any government, Wilson is a pig, the American flag is a rag, and this country is a jail," and the other defendants said, "You bet, you bet." They then told him that they were anarchists, and he advised them to keep their ideas to themselves or they would get into trouble. They said, "We don't care for government or police." He then offered to shake hands with them, but one, not a defendant, said, "We don't want to shake." "I no shake hands with a man who is bought from the government," and some of the defendants said, "We are the same idea." The minister and those who came with him then went home. But before leaving he asked those of the crowd who were pleased with his coming to raise their hands, and most of them did.

On Sunday, the 2d of September, he went there again about half-past 3 or 4 in the afternoon with the same party he had August 26th. What then happened is thus stated by him:

"On our way from the street car to that corner we saw *Mrs. Nardini,* one of the defendants, sitting outside of her house on Bishop avenue. She was reading a book and she saw me, closed the book, and ran ahead of us in the direction towards 300 Bishop avenue, where the meeting hall is. When our band reached the corner there was nobody there and our people started to sing 'Columbia' in Italian. When we reached the corner there was nobody there, but immediately thereafter we saw three of the defendants, *Fratesi, Amedeo,* and *Testolin,* and some more at the same corner where we were standing and they were looking at us very friendly. No remark passed between us at the beginning and others of these defendants came to that corner, among them *Mary Nardini,* who came with the others and was talking to them. While we were singing they started a bad song, an anarchistic song, and they stood five or six feet from us

and they were singing this song while we were singing, and I told them 'When you are through let me know, I'll start again,' and they didn't pay any attention to my advice. After ten minutes they were singing and I told Miss Richter to call for police. There were about fifteen in that group, but I remember only four of the defendants, *Mrs. Nardini, Vincent Fratesi, Amedeo Lilli,* and *Testolin.* Miss Richter got the police, who came after five minutes, and I gave my card to the police and then I asked them for protection, and these defendants were present. The police said, 'You go on with your meeting, I will take care of you,' and then I started in to sing again, and after a minute or two they started their anarchistic song again and I asked the police why he did not stop them, and he said, 'I can do nothing with such a crowd.' I was listening to what the four defendants present there were saying; they were standing close together and they talked loud and they said, 'Before it starts to rain go home, otherwise we will kill you.' It did not look like rain, and the lady said, *Mrs. Nardini,* 'Coward, take a gun and shoot them, who is the first?' She said that to her crowd there, about fifteen, and they called me 'coward, a man paid by the government, we do not want to listen about the war because we have our brothers in the war in Italy, we will smash your face, we destroy you and will throw you in the lake if you come again.' I said, 'I am not a coward man, I will be here again, but I will bring police with me to protect me,' and they told me 'we kill you and the police too.' I do not remember the person who said this, but all the crowd there. They were about five or six feet from me and they said it in a loud voice in the Italian language. They started to come near me and were talking all the time, but I cannot remember the words. Then I said, 'For peace sake, go home,' and I closed the organ and went home and four of these defendants followed us for three blocks, the four defendants I had named, and they were saying 'don't come again.' The four defendants named and ten or twelve others followed. A little booklet with a red picture on the cover entitled 'Nuovo Canzoniere Dei Ribelli,' and a poem on page 5 I saw and I heard that song on page 5 sung by the four defendants I have named. I can translate the Italian language of that song into English and the paper shown me contains a true and correct translation of the Italian song which was sung by those defendants

on that day. I heard two or three stanzas of that song. I heard them sing

We are the sons of work,
We fight for bread,
The proud heroes of gold,
We beseech yet in vain,
We fight against all citizens,
And we fight the citizens,
We fight, we fight, we fight for anarchy,
Down with the frontiers,
Hang high the banners,
We salute humanity.

"I cannot say that I heard any more of this sung, and when we left the second meeting for home and were being followed by this mob the policeman was between our crowd and that crowd and the officer followed us about three or four blocks."

Concerning the third and last meeting when the shooting took place Guljani testified as follows:

"I went to Bishop and Potter avenues again the next Sunday, September 9th, and before I had gone personally to the chief of police for protection and I went to the department of justice of the federal government. On September 9th we first met at the city hall before 3 o'clock, and two detectives, Templin and Weiler, were there with us, and our party consisted of about fifteen or twenty, of whom six or seven were women. We went to Bishop and Potter avenues in a street car and the officers went with us. We got to that corner about five minutes after 3, and when we got to the corner we saw two other detectives there, Wesolowski and Rydlewicz, at the northwest corner, and three other men were waiting and three of these defendants, *Lilli, Denurra,* and the dead one, Tony Formaceo, who were waiting at this corner and talking. Two of these detectives were standing on the northwest corner and two on the southeast corner. We opened the organ and started to play the song 'Columbia' and some strangers came to our corner, stood around and listened. They were standing close to us and appeared very friendly. We did not complete our song because our attention was attracted to an Italian man in the crowd who told us the anarchists were not here, and then I asked him why. No. 1 and No. 8 of the defendants heard this, then asked him

which anarchists he means and he said 'who bothered you last Sunday.' Then I said, 'Where are they?' and he told me 'they are in the club over two hours and today will be trouble here.'

"A few minutes later I saw a crowd coming from the south, on the east side of the street. I do not know what there is on the corner just south on the side that they were coming up. This crowd came in military fashion, all close together, two by two, and at the head of that party was the defendant *Mary Nardini.* While we were singing 'Columbia' the crowd approached about a half a block and they stopped about a block away at the northeast corner and we were on the northwest corner, directly across the street. I cannot say that I saw all the defendants there at that time. The defendant *Denurra* was buttoning his coat, which means in Italian that he is ready to fight, and after buttoning his coat they were talking, but I didn't hear what they said. They remained for two or three minutes and when the crowd reached the corner one of them crossed the street and came to our corner, *Vincent Fratesi,* I could not understand what was said by him, and the dead one, Tony Formaceo, followed him. Then *Vincent Fratesi* went to his crowd and came back again and he spoke to two men and they followed until the middle of the street. At that time I told my congregation to sing 'America,' take off their hats, and we started to sing the national air and *Vincent Fratesi,* in the middle of the street, shook his fist towards us and said 'Coward, for such a rag.' The American flag was floating there and none other. Everybody took part with him with their hands and their fists and not one of them had removed their hats while we were singing 'America.' *Fratesi* repeated the word 'coward,' shook his fist at us and our group all the time he crossed the road until he reached the crowd, and he went back and forward about three times. I saw *Mary Nardini* with the crowd. When *Vincent Fratesi* said that, the officer, Weiler, called me; I went in the middle of the road to meet him and he asked me, 'What did the man say?' and I told him what *Vincent* said, and during our conversation *Vincent* reached the east sidewalk and the crowd remained at the same place, and Weiler went to *Vincent* and said, 'If you don't like this crowd, this meeting, please move on, they have a permit,' and Weiler searched him then, touched his

clothes, but did not put his hands in his pockets. Then behind *Fratesi* was Tony Formaceo, and I saw a revolver in his hands opened on Weiler and then Weiler stepped down and opened his coat to show his badge and then the shooting started. I cannot tell who shot, I saw the revolver, I saw Formaceo's and the officer's. I saw only one other revolver than the one the officer had, the one in Formaceo's hand. Then I went to my crowd and told them to go home because we had women and children with us on our corner. I started to protect them when they started the shooting. I noticed on the other side of the street, where the crowd was, Formaceo and the woman and the rest of them, and that there was a battle, smoking and firing. I don't remember of hearing or seeing any of these defendants do anything or say anything else after the shooting. I saw that Tony Formaceo was injured, and there was such a confusion that I didn't pay any attention. I saw blood running on the forehead of Templin and I saw a handkerchief in the hand of Officer Rydlewicz, but I don't know why. The other two officers went there and held some of the persons in that crowd. We were singing the American hymn 'America' in the Italian translation."

Guliani testifies that he saw present at the meeting September 9th the following defendants: *Mary Nardini, Gavina Denurra, Vincent Fratesi, Amedeo Lilli, Adolph Fratesi, Pasquale Nardini,* and *Bartolo Testolin.*

Maud Richter, who played the organ at all the meetings, and other witnesses on behalf of the state give substantially the same testimony as to what took place at each meeting, so far at least as such testimony bears upon the subject of a conspiracy to commit the offense charged. The testimony as to what, if anything, each defendant said or did at each meeting will be later grouped as to each defendant.

In addition to the conduct of the defendants at each of the three meetings as outlined above there was evidence that some or all of them rented a hall at 300 Bishop avenue, near by, where they were in the habit of coming for the reading of anarchistic and other literature and listening to speeches

from anarchists, socialists, and politicians. In the hall was found and introduced in evidence a mass of literature ranging from scientific, economic, socialistic, agnostic, and free love to anarchistic. The great bulk of it related to anarchy in its extreme form, and the jury were probably justified in finding that most if not all of the defendants were anarchists or sympathized with them. There is, however, no evidence, except such literature and pictures of anarchists hung on the wall, as well as a large target showing some use with a twenty-two caliber rifle or similar gun, to show what the members said or did at any time at the hall. The defendants sought to show the substance of the speech delivered there on September 9th just prior to the meeting of Guliani by John La Duca, a socialist from Chicago, but the court ruled out the evidence. It appears that they had no regular officers of any kind and that when any one wished to contribute money for the rent or literature it was left on the table.

The substance of the evidence on behalf of the state showing what each defendant said or did at the three meetings and what part if any he took in the assault is as follows:

Peter Bianchi: Guliani testified that he could not say that he saw him at any of the meetings. But Officer Templin said he saw him at the third meeting, and so does Miss Richter. Police Officer Fischer saw and spoke to him at the second meeting, and Miss Richter is positive she saw him there. Witness Piantino testified he saw *Bianchi* at the second meeting and that he then said, "If they come down another time we are going to give them a licking." *Bianchi* paid the rent on the hall and so did Marinelli, who was shot, but none of the other defendants paid any rent to the owner. He asked Piantino several times to go to the hall when they had anarchist speakers from Chicago. *Bianchi* claims he paid the rent for a shoemaker who had his shop in the hall and lived there. He also testified that he left the crowd on September 9th before it reached the corner of Bishop and Potter avenues and went to his room to attend to a cut on his

finger sustained a few days before, and that he heard the shooting about ten minutes later while he was in his room.

Gavina Denurra: He admits he was at all three meetings. At the first meeting he shook hands with Guliani and had a talk with him. Guliani heard him say "I don't believe in God, I don't believe in priests, I don't believe in you, I don't believe in government." Guliani testified further:

"I didn't see him do anything then, and about the second meeting I don't remember, but at the third meeting I saw him on our side of the street. I saw him shaking his head and buttoning his coat and whispering and he was there before the shooting on our side of the street, and then he followed *Vincent,* and before they reached the other side the shooting started. I can't say I saw him do anything during the shooting."

There is testimony that to Italians buttoning up one's coat is a signal for a fight.

Adolph Fratesi: With the exception of his being identified as present by several witnesses at the three different meetings the only other testimony bearing upon his conduct is Guliani's statement:

"I saw *Adolph Fratesi* at the first meeting and can't say that I saw him do anything except listening, and I am not sure about him as to the several meetings, but I saw him at the third meeting in the crowd. I saw them shake their fists, but cannot say that he personally shook his fist, but I didn't hear him say anything."

Vincent Fratesi: The evidence quite satisfactorily shows he was present at all the meetings. Guliani testifies he shook his fist at him at the second meeting and said, "Before it starts to rain go home, otherwise we kill you." He was active in trying to break up the third meeting. He came out from his crowd several times into the middle of the street, and immediately before the shooting he came out with *Testolin* and *Denurra.* Templin testified he saw him armed; that he tried to draw his gun and started shooting, and saw him put a gun in his pocket but did not see him point the gun at

any one. *Vincent Fratesi* was being searched by the officers just as the shooting began.

Amedeo Lilli: The evidence shows he was at all the meetings, and he admits he was at the third meeting. At the second meeting he shook his fist at Guliani and said, "Before it starts to rain go home, otherwise we kill you." Officer Templin said he saw him at the third meeting shooting point-blank at him, and the witness Famorlaro says he saw *Lilli* have a revolver before they finished the attack. Templin arrested him a short distance from the meeting but found no gun on him. *Lilli* claims he had no gun with him and that it was in his trunk at his boarding place.

Mary Nardini was at all the meetings. At the second meeting she was excited, talked a good deal and shook her fist at Guliani and called him a pig, and said, "Before it starts to rain go home, otherwise we kill you," according to Guliani's testimony. Miss Richter said that at the second meeting *Mrs. Nardini* called them cowards and said for one to get a gun and shoot Mr. Guliani, and the witness Germanotta testified she said "take the gun and kill this beast," referring to every one. At the third meeting, as the crowd came up, *Mrs. Nardini* seemed excited and talked with the rest, but there is no evidence of what she said, or that she did anything. She had her five-year-old son with her.

Pasquale Nardini, the husband of *Mary Nardini,* denies he was present at the first and second meetings, but admits he was present with his wife and son at the third meeting. Guliani says he can't say he saw him do anything, and there is no testimony that he said or did anything at any of the meetings.

Angelo Pantaleoni admits that he was at the third meeting, but Guliani says he could not say whether he was at any of the meetings and could not say that he saw him do anything or heard him say anything. *Pantaleoni* contributed to paying the rent of the hall.

Louis Serafini: Miss Richter and Officer Wesolowski name him as present at the third meeting, but he says he was in Jawec's saloon with *Belucci* at the time the shooting was done, and so does Jawec. The witness Fiscile testified he saw him pass him by in the crowd after everything was over. Guliani is unable to identify *Serafini* as being present at any of the meetings.

Bartolo Testolin admitted he was present at the second and third meetings, but denied he was at the first meeting, though both Guliani and Miss Richter testified he was there. Guliani said he shook his fist at him at the second meeting and said, "We are ready to receive you next time you come," also that he said, "Before it starts to rain go home, otherwise we kill you," and that he approved of *Belucci* calling the President a pig by saying "Yes, yes." Guliani said he saw his fist at the third meeting; that he was excited and was in the first line of the crowd that crossed the street. In his trunk were found two letters written between September 2d and September 9th, one addressed to "Dearest Comrade" and the other to "Dear Comrade." The former contained this statement:

"Know that last Sunday we had a good time with the evangelists and *Nardini* told you all about it. Now we are preparing for Sunday (in case they will try again) and we will give them a hearty reception. If you cannot come to receive the evangelist with us, shall you come to the drama," referring to a play to be given at the hall.

The latter letter as to the meetings read:

"Know that for two Sundays the circle here is busy to disturb fifty of these dogs of evangelists who have in mind to have a church here close to us. They have come with an organ and trumpets to sing the melodies. Naturally they found a bone very hard because these poor people were obliged to run away together with a pig (police) who had a pretense to be their guardian angel. Therefore the first Sunday they were nailed by words, and the second we did not give them the chance to sing one hymn to their Lord;

now it is believed that they will not come any more. In case they will think to send us in Heaven at any cost, then we will show them the god of rebellion on their head."

No clue appears as to whom or where they were intended to be sent.

In addition to the defensive evidence already referred to, each defendant denied that he was a member of or knew of any conspiracy or concert of action to commit the crime of an assault with intent to murder or any other offense and that he took any part in the assault.

For the plaintiffs in error there was a brief by *Darrow & Sissman* of Chicago, attorneys, and *A. C. Umbreit* of Milwaukee, of counsel, and oral argument by *Mr. Clarence Darrow* and *Mr. Umbreit.*

For the defendant in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney, and *Arthur H. Bartelt,* assistant district attorney; and the cause was argued orally by *Mr. Zabel* and *Mr. Bartelt.*

VINJE, J. It will be seen from the foregoing statement of facts that as to some of the defendants the only proof of the state as to either offense charged in the information rested solely upon an alleged conspiracy on the part of all the defendants to encompass the assault charged. It was proper to show, if it could, that the manner in which each defendant became an accessory before the fact was through a conspiracy entered into before the shooting took place at the third meeting. If such conspiracy was established, then it became a matter of secondary importance just what part each defendant took in carrying it out. If, on the other hand, the conspiracy was not established, and if there was no concert of action agreed upon or understood before the assault began at the third meeting, then it is of the utmost importance to determine just what each defendant said and did at the time of the assault, since he could be held only as an active participant therein.

In proving a conspiracy great latitude in the admission of evidence is permissible, and the limits thereof rest largely in the discretion of the trial court. Error is alleged because the court admitted the contents of much of the literature found at the hall and at the home of the *Nardinis*. It was proper to show that some, if not all, of the defendants belonged to the same club or circle or home, and the character of that club, circle, or home had a bearing upon the question of alleged conspiracy. But proof that the defendants were anarchists, or were even guilty of criminal anarchy, is not sufficient of itself to prove a conspiracy to murder. The proof, most favorably considered in behalf of the state, goes no further than to show that the defendants or some of them were anarchists. It is barren of the necessary indicia of the conspiracy charged. The letters of *Testolin* show at most only an intent on the part of the writer and some others to disturb the next meeting, if one were held. If the proof of conspiracy failed, they were admissible in evidence only against himself.

It appears clearly enough that most of the defendants were angry at Guliani and his party. Whether it was because he spoke about the war and the citizen's duty to the state, or whether it was because he was not a Catholic and spoke slightingly about that religion, is not clear. Probably because of both, but perhaps chiefly for the latter reason. It is also clear that the defendants or some of them entertained the thought of disturbing the meeting, but the execution of that thought would be only a misdemeanor, and those joining in it could not be held for the crime charged unless the jury found that its execution would probably lead to an assault with intent to murder. This question the court refused to submit to the jury though in various forms requested to do so.

In addition to the paucity of proof showing a conspiracy to commit the offense charged, there is considerable undisputed evidence that the assault as made was the independent and spontaneous act of a few of the defendants, precipitated

when the police began to search *Vincent Fratesi* and *Bartolo Testolin.* The testimony shows that a large number of women and children were there—some in the so-called group of defendants which the evidence showed consisted of from twenty to thirty persons. The *Nardinis* had their little boy with them and stood well in front, where the trouble might be expected. Most of the defendants were arrested soon after the shooting took place, but no weapons were found upon any of them. Out of a large number of eye-witnesses to the assault examined, there was no evidence that any one besides Formaceo, who shot first and was killed, Marinelli, who was shot and subsequently died from his wounds, *Vincent Fratesi,* and *Lilli* had weapons of any kind. It would seem probable that a group of twenty or more intending to attack a crowd of nearly a hundred with the intent to murder would arm more of their number with weapons of some kind. Moreover, it appears that as soon as the shooting commenced both crowds began immediately to scatter. This is true, so far as the evidence discloses, of all the defendants except *Vincent Fratesi* and *Lilli.* While no one of these reasons is singly of any controlling weight, they together, with the total lack of any evidence of a preconcerted plan, persuade us that the proof as to a conspiracy failed, and we so hold.

This naturally leads us to an examination of the testimony as to what part, if any, each defendant took in the assault. The substance of such testimony has been set out in the statement of facts and it is unnecessary to repeat it here. From it we conclude and determine that there is no evidence whatever that *Pasquale Nardini* and *Angelo Pantaleoni* took any part at any time in any assault whatsoever, and that as to them the judgment is reversed, with directions to discharge them from further custody.

It is quite probable that *Peter Bianchi, Daniel Belucci,* and *Louis Serafini* were not present at the assault. But be that as it may, it is quite certain that as to them and as to *Mary*

Nardini and *Adolph Fratesi* the evidence would not warrant the conviction of any graver charge than that of simple assault. While they have not been imprisoned under a conviction of that offense, the fact remains that they have been deprived of their liberty under much harsher conditions and for a much longer time than they could have been had such been their conviction. Therefore, looking at the substance of things rather than at technical exactness in the manner of conviction, and in furtherance of substantial justice, it is held that they have been sufficiently punished under the improper conviction for any offense of which they could have been found guilty. The judgment is therefore reversed as to them, with directions to discharge them from further custody.

As to the defendants *Gavina Denurra* and *Bartolo Testolin* we conclude the evidence is of a character which would, with the conspiracy issue out, warrant the jury, under proper instructions, to find them guilty as charged; or to find them guilty of an assault with intent to do great bodily harm; or to find them guilty of a simple assault; or to acquit them. Since, for reasons hereinafter to be stated, error intervened prejudicially affecting their conviction, the judgment as to them is reversed and the case remanded for a new trial.

There is credible evidence that the defendants *Vincent Fratesi* and *Amedeo Lilli* were armed with revolvers and that they used the same during the assault. This evidence, if believed, and we must assume the jury did believe it, warrants their conviction in spite of any lack of conspiracy, unless other prejudicial error intervened to affect the verdict based upon such evidence. For the reasons hereafter stated we conclude that as to them no prejudicial error affects the verdict, and as to them the judgment is affirmed.

We have thus briefly and early indicated the result reached to the end that our further inquiries may be directed to only such assignments of error as affect the convicted defendants or those awarded a new trial.

Exceptions are taken in defendants' brief to some remarks of counsel for the state in arguing the case to the jury; to restrictions as to the cross-examination of some of the state's witnesses, as well as the attitude of the judge throughout the trial towards defendants' counsel. These exceptions have been carefully examined, with the result that we find no prejudicial error as to any of them. They do not seem of sufficient importance to merit separate detailed treatment. The trial was necessarily a long and a slow one and was sharply contested. It would be strange, indeed, if both court and counsel did not occasionally, during the fifteen days it lasted, lapse from the desired dignity and precision of language that we all agree should characterize every judicial inquiry. On the whole we feel that the trial court deserves commendation for its impartial discharge of a difficult duty. It sometimes becomes desirable, if not necessary, to bring counsel back rather abruptly to the real issues in the case. This is said without intending to reflect upon counsel in this case or in cases generally. It is said because we realize that counsel are constantly on the firing line and have little time for mature reflection during the progress of the trial, hence it is easy to go too far at times. When that occurs it becomes the duty of the court to call a halt.

The clerk of the municipal court of Milwaukee county is *ex officio* clerk of the district court of Milwaukee county and he was authorized to issue the warrants under which the defendants were arrested. The district court act expressly so provides. Laws 1899, ch. 218, sec. 9; Milwaukee County Laws, sec. 1347. Nor was it necessary that the record show that the complainant was orally examined under oath by the magistrate issuing the warrant. A sworn complaint in writing sufficiently satisfies the calls of sec. 4776, Stats. *State ex rel. De Puy v. Evans,* 88 Wis. 255, 60 N. W. 433. So, too, an information may be filed for an offense different from that charged in the complaint. Sec. 4653, Stats.

All the defendants except *Peter Bianchi* requested a change

of venue. The ground for such request was chiefly this: On November 24th, and four days before the time set for the trial of defendants, there occurred in the central police station in Milwaukee a bomb explosion resulting in the killing of ten or twelve persons; two of whom, Templin and Weiler, had assisted in the arrest of the defendants. The newspapers of the city charged the explosion, if not directly to the defendants who were in jail awaiting trial, to their friends or nationality. No doubt the sentiment in the community was not the best for an impartial trial of defendants, but since the papers of the city circulated generally throughout the state and the explosion was so generally known everywhere at that time and commented upon, we cannot say that the trial court abused its discretion by refusing the change conditionally, as it did. The request was not renewed upon going to trial, and it appears the jury was secured in less than a day and only about thirty-seven jurors were examined. The apparent difficulty or ease of securing a jury can be taken into account in passing upon the alleged abuse of discretion in refusing a change of venue. In view of the probable conditions existing elsewhere than in Milwaukee and the ease with which the jury was secured, we perceive no error in the court's ruling.

Officer Templin was examined on the preliminary examination of defendants *Vincent Fratesi, Amedeo Lilli,* and *Peter Bianchi.* Officer Weiler was examined at the preliminary examination of defendants *Adolph Fratesi, Louis Serafini, Daniel Belucci, Gavina Denurra, Pasquale Nardini, Mary Nardini, Angelo Pantaleoni,* and *Bartolo Testolin.* Templin and Weiler were killed in the bomb explosion and a transcript of their testimony was offered in evidence by the state. Upon objection made by the defendants the court ruled as to Templin's testimony taken at the preliminary examination of *Vincent Fratesi, Amedeo Lilli,* and *Peter Bianchi,* "I shall receive the testimony so. far as *Vincent Fratesi, Amedeo Lilli,* and *Peter Bianchi* are concerned." When

his testimony taken upon the preliminary examination of *Peter Bianchi* was offered the court said: "It is received only as against defendant *Bianchi.*" When the testimony of Weiler was offered the court said: "It will be received for the same reason indicated." And in its charge to the jury the court told them: "You are also instructed that the testimony of Officers Weiler and Templin which was given at the preliminary examination of some of these defendants in the district court can only be considered by you as against such defendants as were present at the times of such preliminary examination or hearing." This charge, taken in connection with the court's ruling and the colloquy between court and counsel at the time the testimony was offered, advised the jury that the offered testimony could be considered by them only against the defendant at whose preliminary examination it was taken. The use of the expression "against such defendants *as were present,*" in view of the court's specific statements when the testimony was offered, must have been understood by the jury as equivalent to such defendants as were having a preliminary examination when the offered testimony was taken. So understood the testimony was admissible. Sec. 4141*a*, Stats. 1915.

On September 12th the defendants *Peter Bianchi, Vincent Fratesi, Amedeo Lilli, Angelo Pantaleoni, Pasquale Nardini,* and *Adolph Fratesi* were taken to the office of the district attorney, were sworn and examined by him, and their testimony reduced to writing. At the trial such testimony was offered and received in evidence over the objection of the defendants, presumably on the ground that it was voluntarily given. In our criminal jurisprudence there is no room for such procedure. Voluntary confessions and statements made by a defendant may be used against him upon his trial, but that does not contemplate or include a sworn examination by the district attorney. There is no authority for such examination. While the administration of the oath was in fact but an idle ceremony, it by no means follows that the

defendants so regarded it. It is fair to assume they were all ignorant of the illegality of the proceeding, and the district attorney failed to advise them of their constitutional right to refuse to answer any question whose truthful answer they honestly believed would tend to incriminate them. Concede it was not strictly his duty to do so, yet he is in so far a *quasi*-judicial officer as to see to it that if a conviction is had it is in accordance with law. But this statement must not be taken as a criticism upon the official conduct of the district attorney in this case. We are satisfied he acted in the utmost good faith and in the sincere belief that the law sanctioned the procedure. The trial court was of the same opinion. That they should both err in this is not strange in view of the fact that neither this court, nor any other court, so far as we are advised, has ever before passed upon a like question.

To the defendants the examination no doubt assumed the form and sanctity of a judicial proceeding. The oath administered required them to tell the truth. It will not lie in the mouth of even a prosecuting officer, much less of a court, to say that an oath carries with it no sanction. While good ethics and morals require the truth to be told upon all occasions, the necessity for so doing is in law regarded as accentuated by the administration of the oath. The sworn witness is under a species of extra-moral duress to tell the truth. When that fact is coupled with the fact of the illegality of the proceeding, it will be readily perceived that the testimony given by them falls neither under the head of what is ordinarily understood to be a voluntary statement or confession, nor under that of testimony taken in a lawful judicial inquiry. In a criminal case a defendant cannot be compelled to testify. When he does it is his voluntary act, and his statements so made are regarded to be voluntary and therefore admissible in evidence against him. Here the testimony given was not voluntary. This court recognizes the doctrine that a statement may be voluntary though not vol-

unteered (*Tarasinski v. State,* 146 Wis. 508, 131 N. W. 889), but that is quite different from a statement obtained under the *quasi* duress of an oath. For the reasons assigned the statements were erroneously admitted in evidence.

It is idle to discuss whether they worked prejudice as to those of the defendants that are discharged. But since *Vincent Fratesi* and *Amedeo Lilli* are held under the conviction, it becomes necessary to determine whether their statements erroneously received in evidence materially affected the verdict as to them. We deem it unnecessary to give even a synopsis of their statements. It is sufficient to say that they relate almost wholly to their connection with the hall or circle at 300 Bishop avenue and with their belief or disbelief in anarchy. They both contain disclaimers of any knowledge of or connection with any conspiracy whatever, and denials of the fact that they took any part in the assault at the third meeting. It is therefore evident that their statements bear upon the subject of a conspiracy and not upon the assault. At least no damaging fact as to the assault is contained in either statement.

As before indicated, the evidence against these two defendants as active participants in the deadly assault is quite clear and satisfactory and supports the verdict. That being so, it becomes quite immaterial whether or not they were anarchists and whether or not they joined a conspiracy as charged. The result we reach is that as to these two defendants the verdict would probably not have been different had their statements been excluded. Hence their admission was not prejudicial error as to them.

The only explanation that can be given to the fact that all the defendants were convicted of the crime charged in the first count of the information and that all received the same sentence of twenty-five years in the state prison is that the jury found a conspiracy to commit such offense existed before they came to the third meeting and that the trial judge took the same view or he would not have made their sentence

the same. With the conspiracy feature out there was nothing, as we have seen, to convict some of the defendants of any offense, and only a simple assault shown as against others. The instructions, therefore, relating to a conspiracy to commit a felony and those relating to criminal anarchy as defined by secs. 4522*a* and 4522*b* of our statutes should not have been given. In view of the direct testimony showing active and deadly participation in the assault by *Vincent Fratesi* and *Amedeo Lilli,* we conclude that the instructions referred to did not prejudicially affect them. But we do think, in view of the meager and uncertain evidence connecting *Gavina Denurra* and *Bartolo Testolin* with the crime of which they were found guilty, that the giving of such instructions and permitting the jury to find a conspiracy was prejudicial to them. We are inclined to the view that had the conspiracy feature been eliminated as it should have been at the close of the state's case, and had proper instructions relative to what is necessary to become a participant in an assault, in the absence of a conspiracy, been given, the verdict as to them might have been different.

By the Court.—As to the defendants *Vincent Fratesi* and *Amedeo Lilli* the judgment is affirmed. As to the defendants *Gavina Denurra* and *Bartolo Testolin* the judgment is reversed, and the cause remanded for a new trial. The warden of the state prison will deliver them into the custody of the sheriff of Milwaukee county, who will hold them in custody until further order of the court. As to the defendants *Pasquale Nardini, Angelo Pantaleoni, Peter Bianchi, Daniel Belucci, Louis Serafini, Adolph Fratesi,* and *Mary Nardini* the judgment is reversed, and the cause is remanded with directions to discharge them from further custody. The warden of the state prison will deliver them into the custody of the sheriff of Milwaukee county, who will hold them in custody until discharged pursuant to this direction.

KERWIN and ROSENBERRY, JJ., took no part.

NORTHWESTERN BLAUGAS COMPANY, Appellant, vs. GUILD and another, Respondents.

March 7—April 2, 1919.

Sales: Express warranty: Contract construed: When implied warranty arises: Parol testimony affecting writing.

1. In a written contract plaintiff expressly warranted all Blaugas "plants or systems" sold by it to defendants at a stated price to be in good working order and free from defects in material and workmanship. Certain connections and fixtures not included in the plant or system itself were necessary to constitute a complete cooking or lighting plant, and the contract provided separately that, while the defendants might purchase such appliances from whomsoever they pleased, they must first be approved by plaintiff; also that they might be ordered from plaintiff at a certain discount from list prices. *Held*, that the express warranty did not cover such fixtures.
2. As to fixtures ordered by defendants from plaintiff's catalogue which were standard fixtures and sold by a trade name, no implied warranty as to quality or fitness for the particular purpose arose under sec. 1684*t*—15, Stats.
3. Evidence to show an oral warranty made prior to or contemporaneous with the written contract was inadmissible.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to recover upon open book account. The plaintiff, which is the owner of the sole and exclusive right for the sale of Blaugas plants and systems in Richland county, Wisconsin, with other territory, on the 29th day of October, 1915, entered into a written contract with defendants by which it granted to defendants the exclusive right to take orders for sale of Blaugas cooking and lighting systems, together with all necessary equipment, fixtures, stoves, etc., in certain portions of Richland county, Wisconsin, for a period of one year, which contract was renewed for another year on the 7th day of September, 1916. Pursuant to such contract the plaintiff furnished to the second party a number of plants, together with many items of fixtures, appliances, and sup-

plies, from time to time, and this action was brought to recover a balance due on the open account thus incurred.

The defense was in substance that defendants had installed two Blaugas lighting systems on two separate farm premises, which lighting systems had not proved satisfactory because the fixtures supplied by plaintiff with which said lighting systems were equipped were defective in material and workmanship, by reason of which the plants did not prove satisfactory and defendants were obliged to take them out, by reason of which they suffered damage, which was pleaded as a counterclaim to the action. The jury found in favor of the defendants, upon which verdict judgment was rendered dismissing the plaintiff's complaint. From this judgment plaintiff appeals.

A. J. Buscheck of Milwaukee and *L. H. Bancroft* of Richland Center, for the appellant.

For the respondents there was a brief by *Burnham & Black* of Richland Center, and oral argument by *O. D. Black.*

OWEN, J. It appears by the evidence that a Blaugas plant or system consists of a steel cabinet in which is a low-pressure regulator and relief safety valve and pressure gauge, at one end of which are two copper tubes which are connected with a large expansion tank. This cabinet also furnishes space in which to place two cylinders of Blaugas. It also contains certain tubing, valves, etc. The system itself does not contemplate connecting tubes or lighting or cooking fixtures. The Blaugas plant may be connected up with a cooking oven, in which instance it constitutes a cooking plant; or it may be connected with lighting fixtures, in which case it constitutes a lighting plant.

The claim on the part of the defendants is that the fixtures were defective on the two lighting tubes. It was conceded that there was nothing wrong with the plant proper. The question is whether the fixtures were warranted and whether there was a breach of such warranty which furnished the

basis of a claim for damages on the part of the defendants. If such warranty existed it must be found either in the contract or arise by implication of law. The contract contains this provision:

"First party guarantees for a period of one year the Blaugas plants or systems, and all such as may be furnished second party, against defects in material and workmanship, and warrants same to be in good working order. Should there be any defective parts to such Blaugas plants or systems, the first party agrees to furnish, without charge, such new parts as may be necessary to replace those found to be defective."

That is the only provision in the nature of a warranty to be found in the contract. By the terms of the contract the second party agreed to purchase ten No. 50 Standard plants or systems at $90 each within one year from the date of the contract. It is also provided in the contract

"that all stoves, hot plates, ovens, gas fixtures, burners, globes, flat irons, etc., must be specially made for the use of Blaugas, and, while the second party has the right to purchase all such appliances from whomsoever it pleases, they must first be approved by the first party. The first party agrees to furnish the second party, where and when they may be ordered, all such appliances as are shown in the first party's catalogue or in any subsequent catalogue, or additions thereto, at fifty per cent. of the list price thereof."

These separate provisions of the contract, one relating to the plant or system which was to be furnished at the price of $90, and the other relating to fixtures which were to be ordered from the first party's catalogue and paid and furnished at fifty per cent. of the list price thereof, indicate that the term "plant or system," as the same is used in the contract, does not include either cooking or lighting fixtures. The contract therefore deals with the Blaugas plant or system as something separate and distinct from the fixtures necessary to constitute a complete cooking or lighting plant. The war-

ranty only applies to Blaugas plants or systems. It does not apply to either cooking or lighting fixtures. We therefore conclude that the terms of the warranty appearing in the contract do not include fixtures, either lighting or cooking.

If any warranty exists therefor it must be an implied and not an expressed warranty. The statute (sec. 1684*t*—15) provides that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except in certain instances therein specified among which is this:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

If an implied warranty exists it is by virtue of this provision of the statute. It will be noticed that the implied warranty arises by virtue of this provision when the buyer "makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment." That is not the case here. The fixtures ordered were ordered from plaintiff's catalogue. They were standard fixtures, and sold by a trade name. Under such circumstances no implied warranty arises. *Ohio E. Co. v. Wisconsin-Minnesota L. & P. Co.* 161 Wis. 632, 155 N. W. 112.

The court permitted evidence of certain representations made by the agent to defendants at or before the signing of the contract which it is claimed amounted to a warranty, of which the defendants can avail themselves in this case. Under familiar principles of law no express or oral warranty made prior to the written contract can be shown, and the evidence should not have been admitted. *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 590, 63 N. W. 1013.

We are of the opinion that no warranty was shown the breach of which could avail defendants as a defense to this action.

In the main, therefore, defendants have no defense. There are certain minor items concerning which there is some controversy and sufficient evidence to justify a finding in defendants' favor. As to these items plaintiff expresses a willingness to have these doubts resolved in favor of defendants and asks that judgment be ordered in its favor for the amount of its claim less these small items. The amount of plaintiff's claim after such deductions are made is $255.57. We think the evidence shows without dispute that plaintiff is entitled to judgment in that amount, and the judgment will be reversed, and the cause remanded with instructions to enter judgment in favor of plaintiff and against the defendants for $255.57.

By the Court.—Judgment reversed, and the cause remanded with instructions to enter judgment in favor of the plaintiff and against the defendants in the sum of $255.57 as of the date of the verdict.

KERWIN and ROSENBERRY, JJ., took no part.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant, vs. JEWETT and others, Respondents.

March 7—April 2, 1919.

Carriers: Shipment to foreign country: Bill of lading: Published rates: Prior quotation of lower rate: Limiting liability of initial carrier: Sale of goods for charges.

1. The bill of lading issued by a common carrier upon a shipment of goods to a foreign country became the contract between the parties, which could not be varied by a prior oral quotation of a through rate by the agent of the carrier.
2. As to a shipment to a foreign country, the Carmack amendment to the interstate commerce act (34 U. S. Stats. at Large,

595, ch. 3591) did not apply, and it was competent for the parties to make a contract limiting the carrier's liability to its own line.

3. As to such a shipment the initial carrier, by its bill of lading, agreed to carry the goods to "its usual place of delivery at said destination, *if on its road,* otherwise to deliver to another carrier on the route of said destination," and it was stated therein that as to the portion of the route beyond its own line it acted only as agent. The goods were so carried to New York by it and its connecting carriers. Payment of the freight charges was there refused by the firm in whose care the goods were consigned for exportation, the consignee having failed to provide funds for such charges. Subsequently the goods were sold to pay the freight, demurrage, and storage charges. *Held,* that there was no default by the initial carrier by reason of the fact that the shipment did not reach its destination, and that it is entitled to recover the freight charges to New York at the published tariff rate as well as storage charges, less the net amount realized by sale of the goods.

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Reversed.*

Action to recover freight and storage charges on 314 bales of nursery moss shipped over plaintiff's line by the defendant. The action was tried by the court without a jury, and the material facts were not seriously in dispute. In the fall of 1909 the defendant inquired of the plaintiff's agent at Sparta the freight rate on a carload of nursery moss from Mather to Cape Town, South Africa, and was given a through rate. The amount of the rate so given was either $185.25 or $220, the exact figure not being material. After receiving this rate he quoted the same to Pickstone Bros. at Cape Town, and that firm on the basis of the rate so quoted ordered a carload of moss from the defendant which the defendant shipped March 16, 1910, at the station of Mather on the plaintiff's road. At the time of making the shipment the defendant accepted a bill of lading from plaintiff's agent which acknowledged receipt of the moss, "which said company agrees to carry to its usual place of delivery at said

destination, *if on its road,* otherwise to deliver to another carrier on the route to said destination." The bill of lading further stated that the property was consigned to H. E. V. Pickstone, destination Cape Town, South Africa, via P. M. Ry. & Boat at N. Y. c|o E. & N. H. Caldwell, 26 Broadway, New York City, and that "in issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own lines."

The shipment was carried by plaintiff over its own line to Chicago, and by connecting carriers to New York, where delivery was tendered to E. & N. H. Caldwell and demand made for the freight from Mather to New York, amounting to $114 according to the published freight rates on file with the interstate commerce commission. Payment was refused by the Caldwells on account of lack of funds in their hands belonging to the consignee, and the shipment was held for the payment of the freight, demurrage, and storage charges already incurred, amounting to $64.97. The property was thereafter sold to pay the charges and the net amount realized was $32, which was turned over to the New York Central & Hudson River Railroad Company. The court found that the rates of carriage of freight from Mather to Cape Town were not included in the tariffs published by the plaintiff and on file with the interstate commerce commission; that the defendant made his contract of sale with the Pickstone brothers relying on the quotation of a through rate to Cape Town given him by plaintiff's agent; that the plaintiff failed to transport the shipment to Cape Town, the failure resulting in the sale and conversion thereof; and that the reasonable value of the shipment was $205. The trial court concluded that the contract of shipment was a through contract from Mather to Cape Town and adjudged that the defendant recover of the plaintiff the value of the moss so converted, with costs. The plaintiff appeals from this judgment.

For the appellant there were briefs by *Rodger Trump* of Milwaukee and *R. B. Graves* of Sparta, and oral argument by *Mr. Graves.*

For the respondents there was a brief by *John F. Doherty* of La Crosse and *James Moran* of Tomah, and oral argument by *Mr. Moran.*

WINSLOW, C. J. In this case it is held:

1. The familiar principle that oral negotiations are merged in and supplanted by a written contract afterwards entered into between the parties covering the same subject applies to the present case *(Ohio E. Co. v. Wis.-Minn. L. & P. Co.* 161 Wis. 632, 155 N. W. 112), hence the oral quotation of a through rate to Cape Town is of no moment because the written bill of lading became the contract between the parties.

2. This being a shipment to a foreign country, the Carmack amendment did not apply, and it was competent for the parties to make a contract limiting the plaintiff's liability to its own line. *Best v. G. N. R. Co.* 159 Wis. 429, 150 N. W. 484.

3. It follows that there was no default on the part of the plaintiff by reason of the fact that the shipment did not reach Cape Town, and that it is entitled to recover the freight charge to New York at the published rate as well as storage charges, less the net amount realized by sale of the goods, which appears to have been $32.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff for $146.97 and costs.

KERWIN and ROSENBERRY, JJ., took no part.

ANDERSON, Administratrix, Respondent, vs. MILLER SCRAP IRON COMPANY and another, Appellants.

December 6, 1918—April 29, 1919.

Workmen's compensation: Employer's liability not a mere substitute for common-law liability: Principles governing tort actions not applicable: Liability not contractual but statutory: Not limited to injuries sustained within this state.

1. Before the enactment of the workmen's compensation act the liability of an employer for injury to an employee caused by the employer's negligence was that prescribed by the common law as modified by statute. It was a liability *ex delicto* and the principles governing tort actions were applied. Wherever the action was brought the rights and liabilities of the parties were determined by the law of the place where the injury occurred.
2. The liability of the employer under the workmen's compensation act is, however, of an entirely different nature and based upon a wholly different economic theory. Not being based upon, or limited to injuries sustained by reason of, any wrongful conduct or negligent act of the employer, the principles governing tort actions are not applicable. Language used *arguendo* in *Borgnis v. Falk Co.* 147 Wis. 327, limited and explained.
3. Nothing in the language of the workmen's compensation act limits its application, either by express terms or by necessary implication, to injuries sustained within this state.
4. The liability of the employer under the workmen's compensation act is not contractual in the sense that it should be considered as a covenant or part of the contract of employment, but is purely statutory. It grows out of and is incidental to the relationship created by the contract, but it is the statute, not the contract, which prescribes the conditions and the rate of compensation, and these cannot be changed by agreement between the parties, but may be altered by amendment of the statute without impairing the obligation of existing contracts. The fact that our statute is not compulsory and that an employer may elect to come under it or not and may withdraw does not materially affect this question.
5. The liability of the employer under the workmen's compensation act being statutory, the act enters into and becomes a part of every contract of employment made within this state, not as a covenant, but to the extent that the law of the land is a part of every contract; and the rights and liabilities of the parties to such a contract of employment must be determined with reference to the act.

6. Where a contract of employment is made in this state and both employer and employee are within the terms of the workmen's compensation act, the liability of the employer for an injury to the employee is that prescribed by the act and he has no other or different liability.
7. Where a contract of employment was made in Wisconsin and both parties thereto were residents of this state and were subject to our workmen's compensation act, their rights and liabilities in case of injury to the employee must be determined in the courts of this state in accordance with the provisions of said act, whether the injury occurred within or without the state.
[8. Whether in such a case, if the injury occurred in another state in which the employee was at the time prosecuting the employer's business, the courts of that state should enforce our compensation law, or whether if the facts were reversed the courts of this state should enforce a like law of a sister state, not considered.]

APPEAL from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Reversed.*

Personal injury. The defendant company is a Wisconsin corporation, having its principal place of business at Green Bay. Joseph Boncher was a resident of Wisconsin, an employee of the defendant company. The business of the company, a dealer in scrap iron and steel, was carried on almost entirely within the state of Wisconsin. Nearly all of Boncher's services had been rendered within the state. Prior to the time of the accident, which occurred on June 30, 1917, the company had purchased the scrap on a small piece of narrow-gauge railroad near Gibbs' farm, a place about ten miles from Iron River, Michigan. The work of gathering this scrap was under the personal direction of the defendant *Herman Miller*. The employees of the company boarded at Iron River and went to and from their work in an automobile. On the second day, as they were going to work, the automobile, which was being driven by *Herman Miller*, was overturned, and Boncher suffered injuries from which he afterwards died. This action is brought by the administratrix of his estate to recover damages for the injuries sustained by Boncher and for his death. The liability of the defendants is

predicated upon the survival statute of the state of Michigan. There was a verdict in favor of the plaintiff finding the defendants guilty of negligence, and judgment was entered thereon for $4,116.59 damages and costs, from which judgment the defendants appeal. Other material facts will be stated in the opinion.

For the appellant *Miller Scrap Iron Company* there was a brief by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

For the appellant *Herman Miller* a separate brief was filed by *Kittell, Jaseph & Redfield* of Green Bay.

For the respondent there was a brief by *Kaftan & Reynolds* of Green Bay, and oral argument by *Robert A. Kaftan.*

A brief was also filed by *Peter Fisher* of Kenosha and *Worth E. Caylor* of Chicago as *amici curiæ.*

The following opinion was filed January 7, 1919:

ROSENBERRY, J. The plaintiff claims the right to recover damages under the laws of the state of Michigan for the injury and death of Boncher on the ground that the defendant company and its agent, *Herman Miller,* were negligent. The defendants claim that the liability of the defendant company is that prescribed by the workmen's compensation act of Wisconsin (secs. 2394—1 to 2394—31, Stats.), and inasmuch as the plaintiff has requested that, in the event it is held that the workmen's compensation act applies to the company, the judgment shall be reversed as to both defendants, we will first consider that question.

The plaintiff's contention is that the injuries to the deceased, Boncher, having occurred within the state of Michigan, the rights, duties, and liabilities of the parties must be determined in accordance with the law of the state of Michigan; that the workmen's compensation act of the state of Wisconsin cannot affect the rights, duties, and liabilities of the defendant company, because such act can have no extra-

territorial effect. On behalf of the defendant company it is claimed that, this being an action in a Wisconsin court, both parties to which reside within the state of Wisconsin, and the contract of employment having been made within this state, at least in the courts of this state the rights, duties, and liabilities of the defendant company are those prescribed by the workmen's compensation act.

Prior to the enactment of the workmen's compensation act the liability of the employer was that prescribed by the common law as modified by statute. The liability was held not to be one *ex contractu,* but one *ex delicto,* and the liability was held to result from the wrong which followed from the failure of the employer to discharge the duty which he owed to his employee to observe that degree of care which the law required of him. An action to enforce a claim against the employer for violation of his duty was therefore an action *ex delicto* and the principles governing tort actions were applied. An action for personal injuries, being in its nature transitory, might be brought in any court having jurisdiction of the parties, but, wherever brought, the rights and liabilities of the parties were determined by the law of the place where the injury occurred. *Eingartner v. Ill. S. Co.* 94 Wis. 70, 68 N. W. 664. The injuries sustained by the deceased, Boncher, having resulted from an accident which happened in Michigan, the plaintiff claims the benefit of this established principle of law and seeks to enforce the liability of the defendants therefor in accordance with the laws of the state of Michigan, and such would be the plaintiff's undoubted right but for the Wisconsin workmen's compensation act.

It is claimed that the scheme of compensation provided by the workmen's compensation act is a substitute for the common-law liability of the employer and that it should therefore be administered in accordance with the principles applicable to the law of torts. In *Borgnis v. Falk Co.* 147 Wis. 327, 365, 133 N. W. 209, language was used *arguendo*

which, taken apart from its context, may lend colorable support to this theory, but when the whole opinion is considered it cannot be fairly said that it does so. The matter there under consideration was whether or not the legislature could change a remedy for a tort, and it was held that it might do so. That is not equivalent to holding that the liability imposed by the act is tortious in its nature.

It is true that the liability of the employer at common law was that of a wrongdoer and therefore tortious in its nature. It is also true that for that liability the workmen's compensation act has substituted another liability. It does not necessarily follow, however, that the principles applicable to torts should be applied to the liabilities of the employer under the act. The liability of the employer under the act is not based upon any wrongful conduct or negligent act of the employer. However blameless the employer may be, he is nevertheless liable if the employee be injured and he bring himself within the terms of the act.

The liability of the employer under the workmen's compensation act is not only one of an entirely different nature, but it is based upon a wholly different economic theory. The clear intent and purpose of the workmen's compensation act is to burden a particular industry in which the injury to an employee occurs with the damages resulting from such injury and to secure to the injured employee as large a part of the financial burden imposed by the act upon the industry as is possible. The law is therefore administered by state agencies for the benefit of the injured employee. He has the benefit of legal advice, often without expense, and where expense is incurred it is limited by the terms of the law.

Naturally such a radical change in our laws was necessarily followed by a period of adjustment. It ought to be clear to every one at this time, however, and particularly to the legal profession, that along with the practical abolition of the tortious liability of the employer there went an abolition of

the refinements and technicalities which grew up in the administration of the law relating to personal injuries. It was the duty of the legislature to determine what economic policy was in the interest of the general welfare. The legislature having made that determination, it is the duty of the courts so to administer the law within constitutional limitations as to give full effect to the legislative purpose. Many cases have been brought here because counsel have failed fully to grasp the meaning of this fundamental change in an important field of the law.

To what injuries did the legislature intend that the workmen's compensation act should apply? It is claimed that by the language of sec. 2394—1, Stats., which provides that "in any action to recover damages for a personal injury sustained *within this state*" it shall not be a defense that the employee assumed the risk, that the injury was caused by want of ordinary care on the part of a fellow-servant, or that the employee was guilty of contributory negligence, the act is expressly limited to injuries occurring within the state.

Manifestly the state of Wisconsin cannot prescribe the liability of employers for purely tortious injuries to employees occurring without the state of Wisconsin, because, as we have seen, the liability in such a case is that prescribed by the law of the place where the injury occurs. The effect of that part of the act, therefore, abolishing the common-law defenses against claims for personal injuries based upon negligence is necessarily limited in its application to the state of Wisconsin, and the section would have meant the same thing that it now means had the words "within this state" been omitted.

Sec. 2394—3, Stats., which provides that "liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death," where the prescribed conditions

of compensation concur, and that the right to recover the compensation provided in the act "shall be the exclusive remedy against the employer for such injury, or death," and that in all other cases the liability of the employer shall be that at common law, except that he may not avail himself of the common-law defenses of assumption of hazard, negligence of a fellow-servant, or contributory negligence, contains no language from which it may be inferred that its application was intended to be limited to injuries which occur within the state.

The fact that that part of the act which abolishes the three common-law defenses named contains language limiting it to the state, and that such language is not used in that part of the act imposing the statutory liability upon employers, is at least significant and we think persuasive.

It is further argued that, because there is language used to the effect that it shall apply to minors who are legally permitted to work under the *laws of this state;* that where injury is caused by failure of the employer to comply with any *statute of the state* the compensation shall be increased by fifteen per cent.; and that the industrial commission is given supervision of every place of employment and public building *in this state,* the application of the act is thereby limited, so far as it prescribes the liability of the employer, to compensation for injuries occurring within this state.

We do not think this a fair inference to be drawn from the language of the sections referred to. In the sections referred to, the powers conferred and the duties and liabilities prescribed are by their very nature limited to the state. The legislature had no power to require safeguards, legally to authorize the employment of minors, or to regulate or supervise places of employment or public buildings without the state. The fact that the laws relating to the employment of minors, the safeguarding of machinery, and the supervision of places of employment and public buildings are to be considered in determining the liability of employers does not

limit the application of the act, but relates solely to particular classes of injuries and confers special powers upon the industrial commission.

The language of the act does not, either by express terms or by necessary implication, limit its application to injuries which are received within the territorial limits of the state. The legislative intent may be ascertained by a consideration of the legislative purpose in its adoption.

It must be borne in mind in the consideration of this whole subject that the liability of the employer under the compensation act is not limited to those injuries sustained by the employee by reason of the employer's negligence. The liability of the employer under the compensation act is not based upon the employer's neglect of duty and is therefore not tortious. Neither is it contractual in the ordinary sense in which that term is used. It is true that the liability imposed by the act grows out of and is incidental to a relationship based upon contract, but that does not make it contractual any more than it made the liability of the employer at common law contractual, for that, too, was a liability which grew out of and was incidental to a like relationship. If, as is said in some cases (*State v. District Court,* 139 Minn. 205, 166 N. W. 185), the liability of the employer under the law is a contract obligation, then the rights and liabilities of the parties would always be referable to the law in force at the time the contract of employment was entered into. Such is not the case. *Borgnis v. Falk Co.* 147 Wis. 327, 366, 133 N. W. 209. Neither, in our opinion, does the fact that the law has an elective feature and is not compulsory materially affect the question, notwithstanding it has been held otherwise. *Kennerson v. Thames T. Co.* 89 Conn. 367, 94 Atl. 372. In the case last cited it is said: "Acceptance of the act, whether made expressly or impliedly, as permitted by the act, made its provisions a part of these contracts of employment;" and other language to the same effect is used. If this be true, the law is not subject to amendment as against existing contracts

in any respect which would impair the contract within the meaning of that term as used in the constitution. Such construction is to be avoided in the interest of a simple and correct administration of the law, and should not be adopted unless the clearly expressed legislative intent excludes other construction.

The liability of the employer under the act is not tortious and is not contractual in the sense that it should be considered as a covenant or part of the contract, but it is purely statutory. An employer cannot relieve himself of liability under the law by contract. Having entered into a contract of employment with his employee, he cannot by contract change either the conditions or the rate of compensation for which he will be liable in case the employee is injured. He may elect not to come under the law, but when he does elect to come under it his liabilities are not subject to modification by contract between himself and his employee. It is the law, not the contract, which prescribes the conditions and the rate of compensation. Under the provisions of our act he may withdraw; by so doing he does not alter either the law or the contract. If his withdrawal altered the contract it would require the consent of the other party to the contract. An employer who has elected to come under or to remain under the law, as the case may be, does not have a different liability under the terms of the act than he would have were it by its terms compulsory.

In deference to supposed constitutional barriers, many laws in recent years have been brought in by the back door, so to speak; but they are nevertheless the law of the land, and it is not necessary for them to have the sanction of individual contract to vitalize them. The right of free contract has been limited in recent years by legislative enactment in many important particulars in the interest of the general welfare, and comparatively recent decisions of the United States supreme court have so broadened the constitutional field that

it may be fairly said we are at the beginning of a new era. The determination of the relative merits of different economic theories, both in the field of taxation and in that of social reform, will in the light of these decisions be more and more a matter of legislative decision and less and less questions for judicial consideration.

The liability of the employer under the act being statutory, the act enters into and becomes a part of every contract, not as a covenant thereof, but to the extent that the law of the land is a part of every contract. Every contract is enforced and interpreted in accordance with the law of the place where it is made, and the rights and liabilities of the parties thereto are to be determined in accordance with that law. Just as the law of negotiable instruments is a part of every promissory note to the extent that the rights and liabilities of the parties thereto must be determined with reference to the law of the place where the promissory note is made, executed, and delivered, so the rights and liabilities of every employer and employee who enter into a contract of employment within this state must be determined with reference to the workmen's compensation act. 6 Ruling Case Law, 655; *International H. Co. v. McAdam,* 142 Wis. 114, 124 N. W. 1042.

By the law of this state, when an employer enters into a contract with an employee, both being within its terms, in the event of injury to the employee the employer becomes liable therefor in the manner and to the extent prescribed by the workmen's compensation act, and he has no other or different liability. The right of the employee to recover the compensation provided for by the act is exclusive of all other remedies against the employer for any injury which the employee may sustain, and in the event of his death the same limitation applies to his personal representatives.

Will the rights and liabilities of the parties to the contract of employment, as defined and prescribed by the laws of this state, govern if the injury occur without the state? It is ob-

vious that the workmen's compensation act *ex propria vigore* can have no extraterritorial effect. 12 Corp. Jur. 434, and cases cited.

We do not consider in this case, because it is neither argued nor necessary to the decision, whether the workmen's compensation law of this state should be enforced by the courts of Michigan, under the facts and circumstances in this case. Neither do we consider whether or not, were the facts and circumstances reversed, we should enforce a like law of a sister state. In this case both parties to the contract of employment were residents of this state; they were incidentally without the state in the prosecution of the employer's business. The contract of employment was made within this state and the action is brought in the courts of this state, and the question is whether or not in this case the rights and liabilities of the parties should be determined in accordance with the workmen's compensation act or in accordance with the law of the state of Michigan, where the injuries occurred.

As has been said, the workmen's compensation act is based upon the economic theory that it is in the interest of the general welfare that damages arising from injuries sustained by persons engaged in a particular industry shall be borne by that industry. The liability of the employer at common law was limited to cases where negligence could be established. Where negligence was established the burden was borne in the first instance by the employer, who ordinarily had an opportunity to pass all or a part of the burden on. In cases where negligence could not be established, the injured employee bore the entire burden with no opportunity to pass it on. Under the workmen's compensation act the burden falls upon society at large, and is not borne entirely either by the employer or by the employee. If the application of the law be limited to injuries occurring within this state, then in the case of injuries sustained without the state the employer will not be liable except he be negligent, and where he is not negligent the whole loss must be borne by the employee, and the whole legislative purpose is, as to injuries sustained

without the state, defeated. We have extensive borders; thousands of employees are passing out of and into Wisconsin daily, and almost hourly, in the discharge of their ordinary duties. Can it be that the legislature intended that every time these employees crossed the state line their right to compensation for injuries incidental to and growing out of their employment should be changed, and that as to injuries which occur beyond the state line the old system instead of the new should apply?

In *Gould's Case,* 215 Mass. 480, 102 N. E. 693, it has been held that a somewhat similar law of Massachusetts did not apply to injuries sustained without the state. There is language in the act construed in that case which sustains that decision, and throughout the opinion of the court it appears that the application of the act there considered is limited by the fact that "one main purpose of the act is to establish between employee and employer, in place of the common-law or statutory remedy for personal injury, which is based upon tort, a system whereby compensation for all personal injuries or death of the employee received in the course of and arising out of his employment, whether through unavoidable accident or negligence or otherwise (except through his serious and wilful misconduct), shall be determined forthwith by a public board, and paid by the insurer."

If the liability of the employer under the workmen's compensation act is considered simply as a substitute for the common-law liability of the employer, it is logical to hold that the principles governing the law of torts should be applied to the workmen's compensation act.

We do not regard the liability of the employer under the workmen's compensation act merely as a substitute for the common-law liability of the employer. The liability of the employer under the compensation act rests upon an entirely different basis than that of his liability at common law. In the one case his liability is predicated upon the principle that every one who does a wrong resulting in injury to another shall be liable for the damages resulting therefrom. In the

other case injuries to employees are regarded as necessarily incidental to the conduct of industry under modern conditions and not the result of a wrong committed by the employer, and that therefore the damages arising therefrom should be borne by the whole industry rather than by the employer or employee. We therefore hold that the principles which are applicable to actions *ex delicto* should not be applied to claims arising under the workmen's compensation act, but rather that the law should be so construed and applied as to carry out and effectuate the legislative purpose. It was thought by the Massachusetts court that if the law were held applicable to injuries arising without the state great difficulties in its administration would be encountered. But these difficulties do not appear to us to be any greater under one construction than under another. Even if it be held (a matter which is not decided here) that the employee sustaining injuries without the state must proceed in the manner prescribed by the act, it is quite as advantageous to him, compensation being certain, as the right to conduct long and expensive litigation in the courts of this or other states, with the possibility of receiving nothing in the end.

The workmen's compensation act of Wisconsin is so far a part of every contract of employment that the rights and liabilities of the parties thereto in case of injury to the employee, both being subject to it, must be determined in accordance with its provisions, whether such injuries occur within or without the state. The act is controlling as to the rights and liabilities of the parties to the contract wherever the contract of employment is valid. The statutory liability of the employer is exclusive of all other liability of the employer where both parties are under the act.

If the workmen's compensation acts of the several states are to be given effect so as to make them general in their application, they must be held to apply to injuries to employees wherever they occur. If accidents occurring without the state are to be in one class and accidents occurring

within the state are to be in another class, every state might have a workmen's compensation act and yet both the old and the new systems would still be in force and the legislative purpose would not be accomplished. The construction here placed upon the act will give the legislative intent full effect, and if recognized by the courts of sister states will give every employee the remedy provided by the workmen's compensation act under which his contract of employment was made. In addition to the cases hereinbefore referred to we cite the following: *Industrial Comm. v. Ætna L. Ins. Co.* (Colo.) 174 Pac. 589; *Grinnell v. Wilkinson,* 39 R. I. 447, 98 Atl. 103; *Gooding v. Ott,* 77 W. Va. 487, 87 S. E. 862.

Both defendants having appealed, and the plaintiff having requested, in the event the law be held applicable to the defendant company, that judgment be reversed as to both defendants, we will not consider the other questions raised in appellants' brief.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law; the defendants to tax but one bill of costs.

The following opinion was filed April 29, 1919:

ROSENBERRY, J. The *Miller Scrap Iron Company* moves for a rehearing and asks that the decision of the court be so modified as to make it plain beyond doubt that the court is not in this case passing upon any question of election and is not permitting the plaintiff to take a voluntary reversal as to *Herman Miller* without prejudice to any claim of the widow, if any there be, under the workmen's compensation act.

The plaintiff asks that this court upon this motion determine that there was no waiver as to the widow of the deceased for compensation under the act.

The defendant *Herman Miller* appealed, which is in effect an application to this court to reverse the judgment of the trial court. As stated in the opinion, the plaintiff requested,

in the event that the workmen's compensation act be held applicable to the defendant company, that the judgment should be reversed on both appeals. The law having been held applicable, this court without further consideration reversed the judgment on both appeals, and did not decide or attempt to decide and does not now decide whether or not the widow's right to compensation under the workmen's compensation act is in any way affected by the proceedings had in this case. That matter is left to be determined in its proper order in another proceeding where all of the facts may be presented, without prejudice as to the rights of the widow. The motion is denied, without costs.

By the Court.—It is so ordered.

MITCHELL STREET STATE BANK, Respondent, vs. FROEDTERT and another, Executors, imp., Appellants.

January 9—April 29, 1919.

Guaranty to pay indebtedness to bank: Validity of corporate notes: Misappropriation of corporate funds: Connivance of bank: Conspiracy: Personal liability: Pleading: Loans in violation of law: Cashier's check: Claims against decedent: Failure to file: Invalidity of original obligation as defense to guaranty.

1. The defendant E., as manager of two lumber companies, was permitted to and did conduct and control their business affairs as though he were the sole owner. With F., another stockholder, he executed a so-called contract of guaranty whereby they jointly and severally agreed to pay to the plaintiff bank all loans and liabilities of every kind then owing or which might thereafter become due or owing by either of said companies or by E. In an action upon such contract to recover sums loaned or advanced by the bank upon notes, or renewals thereof, executed by E. in the name of one or the other of said companies, although it appeared that during the period covering the transactions in question E. was a director and, a part of the time, president of the plaintiff bank, that he was misappropriating some of the funds of the companies, and that some of their funds—not, however, proceeds of the notes in question—were received from him, as loans or otherwise, by

the plaintiff's cashier personally, findings by the trial court to the effect that plaintiff was not chargeable with complicity or connivance with E. in his frauds upon the companies in connection with any of said transactions, and was not guilty of negligence in respect thereto such as to amount to a fraud on its part upon the companies or upon said F., are *held* to be supported by the evidence.

2. Even if E. received to his own use proceeds of the notes of the lumber companies, his personal liability is covered by the guaranty sued on; and all the facts necessary to show such liability having been proved at the trial without objection and being substantially undisputed, it is immaterial that such personal liability was not specifically pleaded in the complaint.
3. A guaranty of payment may cover existing indebtedness to a bank at the time the guaranty is made, even though such indebtedness exceeds the statutory limitation prescribed in sec. 2024—32, Stats.
4. In this case the evidence is *held* not to show that, after the guaranty in suit was given, there was any violation of sec. 2024—32, Stats., limiting the liability of any person to any bank, or of sec. 2024—34, prohibiting loans by a bank to its officers except upon certain conditions.
5. It appearing that E., managing the business of the lumber companies as if he were the sole owner, was using his personal account in the plaintiff bank and drawing checks thereon for the benefit of the companies, that he had authority to make the notes in question as he did, and that the bank did not profit by the credits given to him and did not know that he was misappropriating any of the proceeds of the notes in question, and it not appearing that after he deposited the proceeds of said notes to his personal account he used them for his personal benefit, the mere fact that such proceeds were credited to his account did not necessarily make the notes void. At most the knowledge which the bank had was only sufficient to put it upon inquiry as to the validity of the notes, and such inquiry would not have shown that E. had no authority to make the notes.
6. When the bank discounted one of the notes in question, executed by E. in the name of one of the lumber companies, it issued to him a cashier's check payable to the order of said company, which check was indorsed in blank by E. in the name of the company and in his own name and then deposited to his personal account. *Held*, that this check was commercial paper and issued for a valuable consideration, and even if the funds derived from the check were misappropriated the note for which the check was given was nevertheless valid if duly executed.

7. The action upon the guaranty having been commenced against both guarantors during the lifetime of F., and revived against his executors after his death, the cause of action based upon the indebtedness of E. to the bank was not barred by the failure to present it as a claim against F.'s estate within the time limited for the filing of claims by creditors.
8. The guaranty in suit, being a direct promise by the guarantors to pay, is not within the rule governing guaranties to pay if the principal debtor fails to do so.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This action was commenced by the plaintiff against the defendants Stephen H. Eller and William Froedtert upon an agreement in writing, a copy of which is set out in the findings of fact.

After the commencement of the action William Froedtert died, and the action was revived against his executors.

The complaint contains three causes of action. The first cause of action sets up a right of recovery upon a note of the South Side Lumber Company in the sum of $12,500, dated July 2, 1914; and the second cause of action is upon a note of $10,000 of the Eighth Avenue Lumber Company, dated July 1, 1914; and the third cause of action upon a $5,000 note of the Eighth Avenue Lumber Company, dated July 12, 1914.

The answer denies liability and sets up several defenses, which so far as material will be referred to in the opinion.

The case was tried to the court and a jury, and at the close of the evidence both parties moved for a directed verdict, whereupon the jury was discharged.

The court found: That the plaintiff was a banking corporation duly organized and existing, with a capital stock outstanding of $50,000. That the South Side Lumber Company was a corporation, duly organized and existing, and engaged in the wholesale and retail purchase and sale of lumber. That William Froedtert, deceased, and defendant Stephen H. Eller were the only stockholders of said corpora-

tion. That said Eller was from April 26, 1909, to November 9, 1914, vice-president, acting president, and manager of said corporation, and was permitted to and did manage and control the business and affairs of said corporation as though he were the sole owner. That the Eighth Avenue Lumber Company was a corporation duly organized January 24, 1911, for the purpose of conducting a wholesale and retail lumber business, with an authorized capital stock of $20,000. That no certificate of shares was ever issued and no meeting of any kind ever held. That defendant Eller conducted the business of said Eighth Avenue Lumber Company with the moneys and property of the South Side Lumber Company and managed and controlled said business as though he were the sole owner thereof. That defendant Eller was a member of the board of directors of plaintiff from the time it commenced to do business in 1906 up to October 12, 1914. That from November 8, 1911, until October 12, 1914, he was the president of the plaintiff, and from January 6, 1908, to October 12, 1914, he was a member of the discount committee of plaintiff. That on or about April 1, 1911, the following agreement was entered into between plaintiff and William Froedtert, deceased, and Stephen H. Eller, to wit:

"In consideration of one dollar, to each of us in hand paid, the receipt whereof is hereby acknowledged, we hereby agree jointly and severally to pay or cause to be paid to the *Mitchell Street State Bank* of Milwaukee all loans, drafts, overdrafts, indorsements, accounts, checks, notes, interest, demands, and liabilities of every kind and description now owing or which may hereafter become due or owing by South Side Lumber Company and Eighth Avenue Lumber Company and by Stephen H. Eller, whenever the same or any part thereof shall be due. All proceedings to collect from the principal debtor or any one else are expressly waived, and we waive demand, notice, and protest of every kind and agree that said bank may without notice surrender or release securities held

by it and grant extensions of time to, and from time to time renew any obligations of, said principal debtors without notice.

"This is a continuing guaranty.

"Milwaukee, Wis., April 1, 1911.

(Signed) "WILLIAM FROEDTERT.
"STEPHEN H. ELLER."

That on the 20th day of May, 1915, said William Froedtert died, leaving a last will and testament, and the above-named defendants, *Kurt R. Froedtert* and *C. H. Kinneke,* are the duly appointed, qualified, and acting executors of said will. That March 2, 1910, said Eller made, executed, and delivered to plaintiff a promissory note in the name of the South Side Lumber Company, payable ninety days from date, with interest at five per cent., in consideration of which note plaintiff delivered to said Eller its cashier's check for $15,000, payable to the order of said South Side Lumber Company, which check was indorsed in blank by said Eller in the name of the South Side Lumber Company and also in his own name and redelivered to the plaintiff by said Eller with the request that it be credited by plaintiff to the account of said Eller. That thereby all of the proceeds of said note were, to the knowledge of the plaintiff at the time of discounting of said note, applied to the individual use and benefit of said Eller, and that notwithstanding that the acts of said Eller and plaintiff in relation to the discounting of said note were such that presumably said Eller was using the proceeds thereof for his individual use and benefit, plaintiff failed to make any reasonable inquiry or exercise reasonable diligence to ascertain whether Eller was authorized to appropriate the proceeds of said note of $15,000 to his own use. That said South Side Lumber Company never received any consideration for said note and never became liable to plaintiff thereon. That when said note became due it was not paid, and on or about the date of its maturity it was, at the request of said Eller, renewed and subsequently likewise renewed from time

to time. That nothing was paid thereon except interest as the same accrued from time to time until on or about March 16, 1911, when there was credited thereon $5,000 for and on account of a note executed in the name of the Eighth Avenue Lumber Company by the direction of said Eller, leaving on April 1, 1911, unpaid on said original note the sum of $10,000 and such interest as had accrued from the last interest payment. That on April 1, 1911, said note was renewed by the plaintiff at the request of said Eller for the amount remaining unpaid, to wit, $10,000. That on or about May 9, 1911, said Eller presented to plaintiff for discount a note signed by him in the name of the South Side Lumber Company for $2,500, which note was discounted by plaintiff, and the sum of $2,479.17, proceeds thereof, less discount, was, at the direction of said Eller, credited by plaintiff to his account. That thereafter said sum of $2,479.17 was paid out by plaintiff to said Eller at his request or upon his order, for his own use and benefit, said South Side Lumber Company receiving no consideration therefor. That notwithstanding that plaintiff had knowledge that said Eller was presumably using the proceeds of said note for his own benefit, it failed to make any reasonable inquiry or exercise reasonable diligence to ascertain whether he was authorized to appropriate the proceeds of said note to his own use, and said South Side Lumber Company never became liable to plaintiff upon said note. That each of said notes was thereafter renewed from time to time at the request of said Eller, and thereafter on January 2, 1912, one renewal note for $12,500 to take the place of the renewals of said two last-mentioned notes was executed by said Eller in the name of the South Side Lumber Company and by him delivered to plaintiff, and said note for $12,500 was thereafter renewed from time to time until the execution of the note for that amount dated July 2, 1914, described in the complaint. That all of said renewals of said notes on or after April 1, 1911, were accepted by plaintiff on the faith of said guaranty and in reliance thereon by plaint-

iff. That said last-mentioned note, dated July 2, 1914, became due October 2, 1914, according to its terms, and demand for payment was duly made of and from the South Side Lumber Company, also from William Froedtert and Stephen H. Eller, but payment was and ever since has been refused, and no payment whatever since date of said note or otherwise, except as hereinbefore stated, has been made either on account of said note or on account of the consideration for which the same was given, or on account of the sum of $15,000 credited to the account of said Eller on account of said cashier's check.

That on or about March 2, 1911, said Eller, purporting to act as president of said Eighth Avenue Lumber Company, made, executed, and delivered to plaintiff a promissory note for $5,000 in the name of said Eighth Avenue Lumber Company by said Eller as president, payable thirty days after date with interest, and at the request of said Eller, and in consideration of the receipt of said note so executed and delivered, said Eighth Avenue Lumber Company was duly credited with the proceeds of the note, and the amount of such credit was thereafter duly paid out by plaintiff on orders of said Eighth Avenue Lumber Company. That on or about March 16, 1911, said Eller, purporting to act as president of the Eighth Avenue Lumber Company, made, executed, and delivered to plaintiff a promissory note for $5,000, executed by said Eller in the name of said Eighth Avenue Lumber Company, payable thirty days after date, with interest, and at the request of said Eller said note was substituted for a note for $5,000 which had been executed by said Eller in the name of said South Side Lumber Company and delivered by him to plaintiff in renewal of the series of renewal notes executed by him in the name of said South Side Lumber Company and theretofore given by him in partial renewal of said note for $15,000, dated March 16, 1911. That upon the face of that transaction by which said note of said Eighth Avenue Lumber Company, dated March 16, 1911, was substituted for a

note signed in the name of the South Side Lumber Company, there was nothing which admitted of any inference that said Eighth Avenue Lumber Company was receiving any advantage or consideration for its note dated March 16, 1911, and that plaintiff had knowledge of such wrongful use of said note by said Eller, because of which said note is not binding upon said Eighth Avenue Lumber Company. That nothing has been paid on account of the principal of either of said notes dated March 2, 1911, and March 16, 1911, respectively, and signed in the name of said Eighth Avenue Lumber Company. That thereafter said notes at maturity were from time to time, at the request of said Eller, renewed, said Eller purporting to act as president of said Eighth Avenue Lumber Company, and on or about February 1, 1912, after a series of renewals of each of said notes, the same were consolidated into a single note for $10,000, which was thereafter from time to time renewed, all of said renewals being executed by said Eller purporting to act as president, or by C. L. Wosgaard, as manager of said Eighth Avenue Lumber Company, by direction or authority of said Eller, and that the last of said renewal notes is the note for $10,000 dated July 1, 1914. That in so far as said note for $10,000 is in renewal of said $5,000 note originally given March 16, 1911, it is without consideration in so far as said Eighth Avenue Lumber Company is concerned, and to that extent said corporation is not liable thereon.

That all of said renewal notes signed in the name of said Eighth Avenue Lumber Company were accepted by plaintiff at the request of said Eller on the faith of and in reliance upon said guaranty signed by said William Froedtert and Stephen H. Eller April 1, 1911. That upon maturity of said note dated July 1, 1914, on October 1, 1914, demand was duly made of said Eighth Avenue Lumber Company, William Froedtert, and Stephen H. Eller for payment thereof, with interest, but no part thereof or any interest since October 1, 1914, has been paid, and no part of the con-

sideration thereof or of the original notes, of which said note dated July 1, 1914, was the final renewal, has been paid. That on or about July 12, 1914, said Eller, purporting to act as president of said Eighth Avenue Lumber Company, delivered a note for $5,000, dated July 12, 1914, signed "Eighth Avenue Lumber Co., C. L. Wosgaard, Mgr.," to plaintiff as the last of a series of notes given in renewal of the note discounted by plaintiff September 17, 1912, for the benefit of the Eighth Avenue Lumber Company. That on said September 17, 1912, plaintiff had duly given on its books of account credit to said Eighth Avenue Lumber Company for $5,000 by applying $1,000 thereof in payment of a note which had been given by said company to plaintiff June 19, 1912, in consideration for an equivalent amount then duly credited to the account of said company; and further by crediting the balance of $4,000 to said Eighth Avenue Lumber Company in its checking account on the books of plaintiff, through which said company has withdrawn said amount by checks issued for the use and benefit of said company. That said note dated July 12, 1914, became due October 10, 1914. That demand for payment was duly made, but no part thereof, or of the consideration for which said note was received by plaintiff, has been paid, and that there is now due thereon the sum of $5,000, with interest at six per cent. per annum from October 10, 1914. That the credits given to said Eighth Avenue Lumber Company by plaintiff September 17, 1912, and upon all renewals thereof, were given to said Eighth Avenue Lumber Company in reliance upon said guaranty and upon the faith and credit thereof.

"That, in so far as said Stephen H. Eller appropriated to his own use and benefit the proceeds of said note and cashier's check, dated March 2, 1910, and of the said notes signed in the name of said South Side Lumber Company, and in the name of said Eighth Avenue Lumber Company, the plaintiff did not profit thereby in any manner whatsoever. That the plaintiff had no knowledge that such proceeds were being

misappropriated by said Stephen H. Eller in defraudation of the rights of said South Side Lumber Company or said Eighth Avenue Lumber Company, or of any fraudulent purpose or intent on the part of said Stephen H. Eller in connection with any such transactions. That the plaintiff is not chargeable with complicity or connivance with said Stephen H. Eller in any frauds which he practiced upon either said Eighth Avenue Lumber Company or said South Side Lumber Company in connection with any of said transactions; and that, in respect to said transactions, the plaintiff was not guilty of negligence of such character as to amount to a fraud on plaintiff's part on said South Side Lumber Company, or said Eighth Avenue Lumber Company, or said William Froedtert."

The court concluded that at the time of the commencement of this action and ever since said Eller, as principal debtor, was liable and indebted to plaintiff in the sum of $15,000, with interest at five per cent. per annum on $10,000 thereof from October 2, 1914, and at the rate of six per cent. on $5,000 thereof from October 1, 1914, and also in the sum of $2,500 with interest thereon at five per cent. per annum from October 2, 1914; and said Eighth Avenue Lumber Company, as principal debtor, was liable and indebted to plaintiff in the sum of $5,000, with interest thereon at six per cent. per annum from October 1, 1914, and the further sum of $5,000, with interest at six per cent. from October 10, 1914. That the plaintiff is entitled to judgment against defendant Stephen H. Eller and against the defendants *Kurt R. Froedtert* and *C. H. Kinneke* as executors of the last will and testament of William Froedtert, deceased, for the sum of $27,500, with interest on the sum of $12,500 at five per cent. per annum from October 2, 1914, and interest on the sum of $10,000 from October 1, 1914, at six per cent. per annum, and interest on the sum of $5,000 from October 10, 1914, at six per cent. per annum, together with the costs and disbursements of this action. Such judgment as against said executors shall be payable only out of funds of the estate of

said William Froedtert, deceased, in their hands or possession as such executors, and shall direct the payment by them of such judgment out of any such funds in their hands or possession as such executors or applicable by law to the payment of such judgment.

Judgment was entered accordingly, from which this appeal was taken.

For the appellants there were briefs by *Bohmrich & Gabel* of Milwaukee, and oral argument by *Louis G. Bohmrich.*

For the respondent there was a brief by *Flanders, Fawsett & Smart* of Milwaukee, and oral argument by *Edward M. Smart.* They argued, among other things, that the charge of conspiracy, which is the foundation of the defense, is completely negatived by the findings of the court upon ample and practically undisputed evidence. The court was evidently of the opinion that there was no showing of conspiracy between Eller and Egerton, and even if there were this did not make the bank a party to the conspiracy. The theory of the trial court was that while the lumber companies were not bound by the notes, the proceeds of which were credited to Eller's account, Eller at least became personally liable for the proceeds of the notes which he received from the bank, and, Eller's personal liability being within the terms of the guaranty equally with the liability of the two corporations, the guarantors were liable. All of the facts from which the inference and conclusions of the trial court were drawn having been brought out upon the trial without objection on any ground relating to the pleadings and being entirely undisputed, the court was at liberty to disregard the mere form of the pleadings and base its findings and judgment upon the undisputed facts. The court should have held the original $15,000 note (note A) and the original $2,500 note (note F) to be valid obligations of the South Side Lumber Company. If Eller was not authorized to issue and discount corporate paper and cause the proceeds to be credited to his personal account, still under a guar-

anty of this character the guarantor cannot set up that defense. This so-called guaranty is a direct promise to pay by the guarantors and cannot be considered in the same light as a guaranty to pay if the principal fails to pay. *International T. Co. v. Mabbott,* 159 Wis. 423, 150 N. W. 429; *John A. Tolman & Co. v. Smith,* 159 Wis. 361, 150 N. W. 419; *Drovers' Dep. Nat. Bank v. Tichenor,* 156 Wis. 251, 145 N. W. 777; 20 Cyc. 1420–1422. See, also 20 L. R. A. N. S. 1000; *Mason v. Nichols,* 22 Wis. 376; *Hubbard v. Haley,* 96 Wis. 578, 71 N. W. 1036; *Luce v. Foster,* 42 Neb. 818, 60 N. W. 1027; *Holm v. Jamieson,* 173 Ill. 295, 50 N. E. 702, 45 L. R. A. 846; *Backus v. Feeks,* 71 Wash. 508, 129 Pac. 86, Ann. Cas. 1914C, 553; *Maledon v. Leflore,* 62 Ark. 387, 35 S. W. 1102; *Klein v. German Nat. Bank,* 69 Ark. 140, 61 S. W. 572; *Weare v. Sawyer,* 44 N. H. 198.

The following opinion was filed February 4, 1919:

KERWIN, J. The appellants assign seventy-six errors, and favor us with a voluminous brief discussing at great length questions of fact as well as questions of law. We shall not attempt to follow counsel in all the details of their discussion, because we believe the case is ruled by a few propositions, which we shall treat in this opinion.

1. It is argued that a conspiracy existed between Eller and J. F. Egerton, cashier of plaintiff, to defraud Froedtert and the lumber companies. This charge is based mainly upon the contention that the proceeds of some of the notes made by Eller as president of the lumber companies were credited to his personal account, and that Eller colluded with Egerton, officer of plaintiff, in misappropriating money which belonged to the lumber companies.

The court below found against this contention upon sufficient evidence, and in a written opinion in the record said:

"During the period of the transactions involved in this action S. H. Eller was undoubtedly guilty of misappropriating some of the funds of the South Side Lumber Company

and of the Eighth Avenue Lumber Company. But for the fact that he was permitted to manage and control their affairs as the sole owner thereof, his conduct in those transactions with the plaintiff might well have aroused the suspicions of those dealing with him. However, the evidence does not establish that Egerton received any of the proceeds of the loans which plaintiff seeks to recover in this action. Likewise it does not establish that the plaintiff is chargeable with knowledge that the proceeds of any of those loans were actually misappropriated by Eller in defraudation of the rights of the South Side Lumber Company and the Eighth Avenue Lumber Company.

"This evidence does establish that, on the dates presently stated, checks for the following amounts issued by Eller in the name of the Eighth Avenue Lumber Company to Egerton were duly indorsed and deposited by Egerton to his credit, and honored by the plaintiff out of the deposits of the Eighth Avenue Lumber Company, to wit: April 4, 1911, $500; June 3, 1912, $1,500; June 4, 1912, $3,000. At the time those checks were issued to Egerton the Eighth Avenue Lumber Company was not indebted to him, and he denies that he had any personal transaction with it. Likewise, those checks were never charged to him on that corporation's books, but it does not appear that either Egerton or plaintiff had knowledge of the failure to make such entries. The evidence also establishes that on April 4, 1911, Eller charged himself with $2,000 on the books of the South Side Lumber Company (page 87, Exhibit 162, for identification) for money belonging to that corporation which he applied to his own use on that date in making a loan of $2,500 to Egerton. However, in each instance, prior to the time that Egerton received those checks and that loan, the credits obtained on account of the loans which plaintiff seeks to recover in this action had been exhausted, with the exception of $5,000 credit given to the Eighth Avenue Lumber Company on September 17, 1912. On the other hand, the latter credit was not given until after those checks had been issued and that loan made to Egerton, and hence that credit could not have been used for his benefit. But for the suspicion naturally aroused by the absence of any explanation as to those three checks and Eller's omission to enter them on the corpora-

tion's books, there would be no basis for a suggestion that funds belonging to the Eighth Avenue Lumber Company had been misappropriated to the use of Egerton, or that he knew that there had been any misappropriation by virtue of those checks. However, even if Egerton had benefited by such misappropriation in those instances, with knowledge of the source of the moneys received by him, it would not follow under the evidence that the plaintiff is chargeable with knowledge acquired by Egerton in a transaction which was wholly for his personal purposes.

"Consequently the evidence does not establish that the plaintiff, as Egerton's principal, is chargeable with connivance with Eller in his frauds upon those corporations, or that the plaintiff is chargeable with negligence of such character as to amount to a fraud on those corporations and William Froedtert."

The evidence in the case tends to show that Eller was entitled to have and handle the proceeds of the notes of the lumber companies. The evidence also shows that Eller had full charge and control of the business of both lumber companies and the right and authority to handle the funds of such companies. It is clear that the defense of conspiracy is wholly without merit.

2. The so-called contract of guaranty set out in the findings clearly covers any personal liability of Eller to the bank; and even though Eller received money, proceeds of notes of the lumber companies, still such personal liability of Eller's is clearly covered by the guaranty upon which suit is brought. The guaranty covers "all loans, drafts, overdrafts, indorsements, accounts, checks, notes, interest, demands, and liabilities of every kind and description now owing or which may hereafter become due or owing by South Side Lumber Company and Eighth Avenue Lumber Company and by Stephen H. Eller."

It is claimed that the personal liability of Eller could not be shown under the pleading. This contention is without merit, as clearly appears from the record. All the facts

necessary to be proved under this head were brought out upon the trial practically without objection and were substantially undisputed. The guaranty is "a joint and several" agreement. Under the evidence and findings in the case the personal liability of each signer of the guaranty was established.

3. It is further argued by counsel for appellants that the plaintiff violated secs. 2024—32 and 2024—34, Stats., limiting the liability of any person to any bank and prohibiting loans to officers except upon certain conditions.

It does not appear that there has been any violation of the above statutes, for several reasons. In the first place, we know of no reason why the guarantors could not guarantee the payment of existing indebtedness to the plaintiff at the time the guaranty was made, even though such indebtedness exceeded the statutory limitation. It appears from the record that the only note discounted by plaintiff after the guaranty, the proceeds of which were credited to Eller's private account, was a $2,500 note made May 9, 1911, by the South Side Lumber Company.

It further appears from the evidence and findings that at no time after the execution of the guaranty was the statutory limitation violated by Eller or the lumber companies. The $15,000 note, dated March 2, 1910, was reduced to $10,000 by a note dated March 16, 1911, for $5,000, and a new note given for the $10,000, dated March 16, 1911, and this latter note was afterwards and on January 2, 1912, consolidated with a $2,500 note, dated May 9, 1911, and a new note for $12,500 given for the amount, and such renewal constitutes the plaintiff's first cause of action.

Two notes of $5,000 each, dated respectively March 2 and March 16, 1911, were consolidated into a note of $10,000, dated February 1, 1912, and the renewal thereof is the basis of plaintiff's second cause of action. The renewal of a note dated September 17, 1912, for $5,000, is the basis of plaint-

iff's third cause of action. The proceeds of the two notes of $5,000 each were paid to the Eighth Avenue Lumber Company, the maker of said notes.

So the argument that the bank exceeded its statutory limitation in making loans either to the lumber companies or to Eller is without merit.

It also appears that the $15,000 note made by the South Side Lumber Company was discounted by plaintiff, and it issued and delivered a cashier's check to Eller, payable to the order of the South Side Lumber Company, which check was indorsed in blank by Eller in the name of the lumber company and in his own name and redelivered to the plaintiff bank with direction to be credited to his own account, which was done; that the proceeds of other notes of the lumber companies were credited to Eller. But it appears from the evidence and findings that Eller managed the business of the lumber companies as if he were the sole owner and that he was using his personal account for the benefit of the South Side Lumber Company. The cashier's check issued to the lumber company for the $15,000 note amounted to a loan of $15,000 to said company.

The court below found that the South Side Lumber Company was not liable on this note or upon the $2,500 note, because the proceeds were credited to Eller, that plaintiff failed to make reasonable inquiry, and that the lumber company received no consideration for the note.

Counsel for respondent asks a review of these findings under sec. 3049*a*, Stats., and excepted to such findings, and filed in this court notice as required by the statute.

In addition to the findings above referred to, the court found that the bank did not profit by the credits given to Eller and had no knowledge that the proceeds were being misappropriated in defraudation of the rights of the lumber company or of any fraudulent purpose or intention on the part of Eller; that the bank was not chargeable with any

complicity or connivance with Eller in any fraud upon the lumber company; and that the bank was not guilty of any negligence of such character as to amount to a fraud.

The evidence does not show that after the proceeds were credited to Eller's account he used them for his personal benefit. The fact that the proceeds were credited to his account did not necessarily make the notes void. It appears that he had authority to make the notes as he did. At best, the knowledge which the bank had of all the circumstances was only sufficient to put it upon inquiry as to the validity of the notes. *Pelton v. Spider Lake S. & L. Co.* 132 Wis. 219, 112 N. W. 29.

Assuming that the facts were sufficient to put the plaintiff upon inquiry, it was only chargeable with such knowledge as inquiry would have discovered, and nothing would have been discovered sufficient to show that Eller did not have authority to execute the notes. *St. Clair v. Rutledge,* 115 Wis. 583, 92 N. W. 234. It appears from the record that Eller was invested with all the powers of the stockholders, board of directors, and officers. As appears from the record, he was the whole thing and had absolute authority. He was permitted to run the business as if it were his own. Moreover, the evidence shows that he was checking against his individual account for the benefit of the lumber companies. In addition to this, the cashier's check given on discount of the $15,000 note was made out in favor of the South Side Lumber Company. This check was commercial paper and issued for a valuable consideration, and, even if the funds derived from this check were misappropriated, the note for which the check was given was, nevertheless, valid if duly executed. *Drinkall v. Movius State Bank,* 11 N. Dak. 10, 88 N. W. 724, 57 L. R. A. 341; *Henry v. Allen,* 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658.

4. It is further insisted that the cause of action under the guaranty, based upon the indebtedness of Eller, is barred by order of the county court limiting the time for filing

claims. There is no merit in this contention. The suit was brought in Froedtert's lifetime and revived against his executors. The suit involves a proceeding against the estate of Froedtert. It is a remedy to which the plaintiff is entitled.

5. In the case at bar the so-called guaranty is a direct promise by the guarantors to pay, and does not fall within the rule of that class of guaranties to pay if the principal fails to do so. *International T. Co. v. Mabbott,* 159 Wis. 423, 150 N. W. 429; *John A. Tolman & Co. v. Smith,* 159 Wis. 361, 150 N. W. 419; *Drovers' D. Nat. Bank v. Tichenor,* 156 Wis. 251, 145 N. W. 777.

We find no prejudicial error in the exclusion of evidence. Upon any theory of this case we think it clear that the judgment below is right and must be affirmed.

By the Court.—Judgment affirmed.

ESCHWEILER, J., dissents.

A motion for a rehearing was denied, with $25 costs, on April 29, 1919.

WALDUM, Appellant, vs. LAKE SUPERIOR TERMINAL & TRANSFER RAILWAY COMPANY and another, Respondents.

January 10—April 29, 1919.

Evidence: Judicial notice: Reports to railroad commission: Common carriers: Who are? Statutes: Construction: Workmen's compensation: When act does not apply to railway employees: Industrial commission: Decisions on questions of law not binding: Jurisdiction: Waiver: Acceptance of compensation act by employee.

1. Judicial notice is taken of the annual reports and the tariffs filed by a railway company with the railroad commission.
2. A common carrier is one who undertakes for hire or reward to transport from place to place the goods of such as choose to employ him.

3. It is not so much the extent of the use which the public makes of the facilities owned and operated by a railway company which determines its true character as a carrier, as it is the right of the public to require the services which the company is equipped to perform.
4. A terminal and transfer railway company, organized and owned by four other railway companies whose lines entered a city, owns steam locomotives but no cars. Its tracks run from the termini of the other companies to the various industries, docks, and elevators in the city, and it is bound to transport thereon, upon a tariff basis approved by the railroad commission, all cars offered to it, not only by the four owning companies, but by any other railway company. *Held,* that it is "operating a steam railroad as a common carrier," within the meaning of sub. (3), sec. 2394—8, Stats. 1915, and an employee injured in its service was not subject to the workmen's compensation act unless both employer and employee had accepted in writing the provisions of the act.
5. The facts that nearly the whole of the business transacted by the company in question is done for the four railway companies which own it; that it settles with such companies under special contracts; and that it handles no freight except such as it receives from or through other railway companies, so that shippers must contract for its services through other carriers, are not material, the significant facts being that the transportation service it renders is in every instance a part of the service contracted for by a shipper, and that any shipper may at any time command such service.
6. The history of the provisions of the workmen's compensation act relating to railroad companies confirms the construction above given to the words "common carrier" as used in sub. (3), sec. 2394—8, Stats. 1915.
7. A practical construction, however long adhered to, cannot override the plain terms of a statute.
8. The question whether the business transacted by a railway company is that of a common carrier or a private carrier is a question of law, and courts are not bound by the decisions of administrative bodies in regard to constitutional and legal questions. The rule that findings of fact by the industrial commission must be upheld if supported by any substantial credible evidence is not applicable to such questions.
9. Under sub. (3), sec. 2394—8, Stats. 1915, where an employee who was injured while switching cars for a railroad company operating a steam railroad as a common carrier was not subject to the compensation act because he had not accepted its provisions, the industrial commission had no jurisdiction of

the subject matter of an award of compensation for the injury, and the employer could not, even by stipulation, confer jurisdiction or waive the lack of it.

10. Although an employee of a railroad company operating a steam railroad as a common carrier became subject to the compensation act soon after its enactment (ch. 50, Laws 1911), by reason of the company's election to come under the act, yet where his subsequent employment had not been continuous he was not subject to the act after the enactment of sub. (3), sec. 2394—8, by ch. 599, Laws 1913, unless he filed the notice of acceptance therein provided for. [Whether he would have continued to be subject to the act if his employment had been continuous, not decided.]

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Plaintiff was injured August 30, 1916, at Superior, while working for the *Lake Superior Terminal & Transfer Railway Company,* hereinafter referred to as the *Railway Company.* At the time of the accident he was engaged in switching a string of empty box cars from the yards of the Northern Pacific Railway Company to the C. Reiss Coal Company's dock in the city of Superior. He was on top of a box car which was struck by other cars, and he was thrown under the cars and suffered injuries which resulted in the loss of his left arm. He had been employed by the *Railway Company* off and on since 1908. The *Railway Company* made application to the *Industrial Commission* for adjustment of compensation under the terms of the workmen's compensation act. Plaintiff claimed that the *Industrial Commission* had no jurisdiction because the employees of the *Railway Company* were not subject to the workmen's compensation act. The *Industrial Commission* after a careful examination held that it had jurisdiction and made an award. Plaintiff brought an action in the circuit court for Dane county to set aside the award, and upon hearing the circuit court made an order confirming the award, and judgment was entered thereon, and from such judgment plaintiff brings this appeal. Other material facts are stated in the opinion.

W. P. Crawford of Superior, for the appellant.

J. A. Murphy of Superior, for the respondent *Lake Superior Terminal & Transfer Railway Company.*

For the respondent *Industrial Commission* there was a brief by *Spencer Haven,* attorney general, and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

The following opinion was filed February 4, 1919:

ROSENBERRY, J. Sub. (3), sec. 2394—8, Stats. 1915, is as follows: "The provisions of sections 2394—3 to 2394—31, inclusive, shall not apply to employees operating, running or riding upon, or switching freight or other trains, engines or cars for a railroad company operating a steam railroad as a common carrier," unless both employer and employee shall have accepted the provisions of the act in writing. The *Railway Company* admits that it is organized as a railroad company and is authorized by its charter to do business as a common carrier, but contends that it does not operate a steam railroad as a common carrier.

The main question in this case is, Was the *Railway Company* at the time in question operating a steam railroad as a common carrier? The *Railway Company* is incorporated under sec. 1820, ch. 87, Stats., which authorizes the formation of a corporation for the "purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons or property," etc., and provides that upon the issuance of the patent provided for in the section the corporation so formed "shall possess all the powers and privileges and be subject to all the provisions of the law regulating railroad corporations."

Sec. 3214, Stats. 1915, provides:

"Every association or company formed for the transportation of passengers or property, either by boats, vessels, stages or other means, shall make a statement of the names of the persons comprising such association or company and

file a copy of the same in the office of the clerk of the circuit court of each county through or into which it may transact business. All persons, companies and corporations engaged in any such business shall be deemed common carriers."

The following facts are substantially undisputed: The *Railway Company* was incorporated by four railroads entering the city of Superior: the Great Northern Railway Company, the Northern Pacific Railway Company, the Duluth, South Shore & Atlantic Railway Company, and the Chicago, St. Paul, Minneapolis & Omaha Railway Company; and by their joint action they fix and determine its policies. The tracks of the *Railway Company* run from the termini of the railroad companies which it serves to the various industries, docks, and elevators of Superior, about 100 in number. The *Railway Company* has filed its annual reports as a railroad company with the railroad commission of Wisconsin from 1914 to 1917, inclusive. On November 16, 1911, it filed its tariffs with the railroad commission, effective October 15, 1911, by which tariffs it is bound to transport loaded cars from one carrier to another, or from a carrier to an industry on its own tracks, or from connecting roads to industries on the Tower Bay front, at from $1 to $3 per car; to transport loaded cars from one industry to another at three quarters of a cent per hundredweight of contents; to handle less than carload lots from a connecting carrier to an industry and from one industry to another at five cents per hundredweight. The fact that it settles with the owning companies on a basis of cost is immaterial. While the reports and tariffs were not proved, we take judicial notice of them. *Chicago & N. W. R. Co. v. Railroad Comm.* 156 Wis. 47, at p. 62, 145 N. W. 216, 974. The *Railway Company* owns no passenger or freight cars, but has eleven steam locomotives and employs from thirty to seventy men. As the business is actually conducted, the principal part of it is taking cars from the owning companies, switching them to plants, docks, and elevators, and returning them to the owning com-

panies. At the time of its organization ninety-nine per cent. of its total business was transacted for the owning companies. In recent years about ninety per cent. of its business has been transacted for the same companies, the ten per cent. remaining being made up of work the *Railway Company* does for other connecting railroads and a small amount of business done for the public. The articles of incorporation contain the following provision:

"The general nature of the business of this company shall be to acquire depot, storing, yard and shop grounds, construct, maintain, use and operate for public use railroad lines and tracks, buildings, depots, depot grounds and storage tracks and shops and other railroad conveniences and appliances, in the county of Douglas, in the state of Wisconsin, for the transportation of rolling stock, freight and passengers, and for the purpose of connecting any and all the other various lines of railroad running to or into the said county of Douglas, and for the purpose of transferring rolling stock, freight and passengers between such railroads and between such railroads and docks and piers and vessels touching at any port or place in the county, and generally to exercise powers conferred by the statutes of the state of Wisconsin relative to the organization and powers of railroad corporations."

The *Railway Company* has not handled for the general public any freight other than what is contained in the cars of some other railroad. The business transacted for local industries is not accepted directly by the *Railway Company*, but is contracted for through some of the owning companies. Waybilling and arrangements for shipment over its tracks are taken care of by the companies whom it serves. It has no ticket office and handles no freight except such as it receives from or through other railroad companies.

A common carrier is defined as one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place. This definition is ap-

proved in *Doty v. Strong,* 1 Pin. 313, at p. 324. See 10 Corp. Jur. 339, note 35.

What did the legislature mean by exempting the employees of "a railroad company operating a steam railroad as a common carrier?" Obviously it left subject to the act the employees of all railroad companies operating by electricity or other motive power than steam. By limiting the exemption to the employees of a railroad company which operates a steam railroad as a common carrier, it made subject to the act the employees of the numerous railway companies operating as private carriers within the state, such as logging railroads and other like railroads operated for private purposes. We are not disposed to rest this decision upon narrow technical grounds, but rather upon broad general principles, and to ascertain and if possible give effect to the intent of the legislature, which is after all the primary purpose in the construction of this or any other statute.

What the *Railway Company* in fact does is to accept for transportation for hire the property of all persons who have any need of the services which it is equipped to render. Under its contract and tariffs it must transport all cars offered to it by any of the companies which it serves, and the transportation service which it renders is in every instance a part of the service contracted for by a shipper. The fact that the shipper must contract for the service through another carrier is immaterial. The distinctive feature is this: any shipper may at any time command the transportation services of the *Railway Company.* It is bound to serve not only the owning companies, but all other companies similarly situated, upon a tariff basis approved by the railroad commission; and no doubt, should still other railroad companies tender it cars for transportation, it would also be obliged to accept and transport such cars under its tariffs. The fact that it settles with the owning companies under special contracts is not significant in this connection. It may not de-

cline to render the service which it is equipped to perform and which it holds itself out as being ready, able, and willing to perform, whether that service be for the owning companies or for other companies. It is not so much the extent of the use which the public may make of the facilities owned and operated by the railway company which is determinative of its true character as it is the right of the public to require the services which the railway company is equipped to perform. *Union L. Co. v. Railroad Comm.* 144 Wis. 523, 129 N. W. 605; *Tap Line Cases,* 234 U. S. 1, 24, 34 Sup. Ct. 741. Here, the right of all shippers to have the services of the *Railway Company* in the transportation of property for hire makes it a common carrier.

All of the service which the *Railway Company* renders is in part performance of a contract of shipment made by a common carrier, and in completing the contract of carriage it does its work in exactly the same manner that the railroad companies would do it if they operated their own cars and engines over its tracks. For convenience it transacts a part of the common carrier business of the companies which it serves under a separate organization.

It is equipped to perform a limited service, but everything it does do, it does in the transportation of persons and property for hire exactly as any common carrier would perform the same service. The fact that the terminal service in some instances is rendered under a special contract at cost does not change the nature of the operation by which it is rendered. The hazards to which the employees of the *Railway Company* are exposed are the hazards common to the employees of all steam railroads operated by common carriers.

The *Railway Company* not only operates in the same manner that a common carrier operates, but it is a common carrier, and we are persuaded that the language of the act was used advisedly by the legislature, particularly upon a consideration of the state of the law at that time, including the provisions of our statutes and a history of the provisions of

the workmen's compensation act relating to railroad companies. The workmen's compensation act was ch. 50 of the Laws of 1911. Sec. 1 of that act (sec. 2394—3, Stats.) contains the following provision:

"Except as regards employees working in shops or offices of a railroad company, who are within the provisions of subsection 9 of section 1816 of the statutes, the term 'employer' as used in sections 2394—1 and 2394—2 shall not include any railroad company as defined in subsection 7 of said section 1816," etc.

Sec. 1816 relates to the liability of a railroad company for personal injuries sustained by its employees, and by sub. (7) a railroad company is defined as follows:

"Any company, association, corporation, or person managing, maintaining, operating, or in possession of a railroad in whole or in part within this state whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver."

"Employer" was defined by sec. 2394—5 as follows:

"(2) Every person, firm, and private corporation (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee for which compensation under sections 2394—1 to 2394—31, inclusive, may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of sections 2394—1 to 2394—31, inclusive, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section."

On the 31st day of May, 1912, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company filed an election whereby it attempted to become subject to the provisions of ch. 50 of the Laws of 1911, and in *Minneapolis, St. P. & S. S. M. R. Co. v. Industrial Comm.* 153 Wis. 552, 141 N. W. 1119, it was held that the railroad company might accept the act as to all its employees, and that it was not limited by the

act to that class of employees described in sub. (7) of sec. 1816, being shop and office employees. The court said:

"The compensation act . . . affords railway companies competency to come under it, placing all their employees on the same favored plane as other employees in industrial pursuits."

Whether the employees or the railroad companies moved we do not know, but at the next session of the legislature the law was amended by ch. 599 of the Laws of 1913, and the provision sub. (3) of sec. 2394—8 was re-enacted by the Laws of 1915, ch. 316, the material provisions of which are hereinbefore stated. The language under consideration came in by way of amendment after the subject had been reconsidered. We must assume that the words of the amendment were chosen with reference to their established legal meaning. What did the term "common carrier" as there used include?

In *State ex rel. Northwestern C. R. Co. v. Willcuts,* 140 Wis. 448, 122 N. W. 1048, decided at the August term, 1909, this court had under consideration the question whether or not the property of the Northwestern Coal Railway Company within the city of Superior was subject to local taxation. That company had about eight miles of tracks, including its switch tracks, and its principal business was taking empty cars to the dock and returning them loaded with coal to the connecting railways, the connecting railways being the four companies which own the *Railway Company* whose rights are in question here. There, as here, it was insisted that although organized as a railway company it was operating its railroad for a private and not for a public purpose. It was there said:

"Under the law in relation to the subject under consideration, the question is whether the property is necessarily used for a public or *quasi*-public purpose in order to enable the plaintiff to perform its duty as a common carrier. . . ."

The court further said:

"The mere fact, however, that a large part of the business of plaintiff was done for the Pittsburgh Coal Company in which it is interested did not deprive plaintiff of its character of common carrier or render its property devoted to a private use so long as it was in fact organized as a common carrier and serving the public in that capacity, although to a limited extent because of location and conditions which limited such service. . . . Whether the property of plaintiff is devoted to a public use is not determined by the extent of the use, but by the right of the public generally to use it, and the fact that it is used for public purposes by all who desire to use it.

"Upon the admitted facts as they appear from the record we see no escape from the conclusion that the plaintiff was a common carrier and its property devoted to a public use, and, though limited in the extent of such business, it was doing the business of a common carrier. Its road and switch tracks were subject to use by all the public. The road carried for the public generally between its termini, the coal dock and several other railroads." *State ex rel. Northwestern C. R. Co. v. Willcuts,* 140 Wis. 448, 453, 454, 122 N. W. 1048, 1050.

It is strenuously insisted that this case involved a question of taxation and that it was necessary to go no further than to hold that the property of the company was devoted to a public use, and that the decision should be so limited. Whether that be true or not, the use of the words "common carrier" shows how it was commonly used and understood at that time. We need not go further.

In 1909 two cases involving substantially the same question involved in this case had been decided in the federal courts *(U. S. v. Sioux City S. Y. Co.* 162 Fed. 556, and *Union S. Co. v. U. S.* 169 Fed. 404); and after the enactment of ch. 50 of the Laws of 1911, and before the amendment by ch. 599 of the Laws of 1913, the case of *U. S. v. Union S. Y. & T. Co.* (226 U. S. 286, 33 Sup. Ct. 83) was decided by the supreme court of the United States. The

gist of the cases is set forth in a statement made by Mr. Justice VAN DEVANTER while a circuit judge, found in 169 Fed. 404, and restated with approval in 226 U. S. at page 305, 33 Sup. Ct. 88, as follows:

"Its [the Stock Yards Company's] operations . . . include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens and *vice versa* is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point. And it is of little significance that the Stock Yards Company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire a part of the transportation of every live-stock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

In *Texarkana & Ft. S. R. Co. v. Rosebrook-Josey G. Co.* 52 Tex. Civ. App. 156, 114 S. W. 436, the same question was before the court of civil appeals of the state of Texas, which held that a railroad company switching cars from its switch tracks to and from warehouses situated on its spurs and switches and delivering them upon the transfer tracks of other railroad companies in the same town was a common carrier while engaged in such business.

We must presume that the legislature adopted the language here under consideration with a full understanding of its established legal effect, particularly as used in our stat-

utes and decisions, and it can scarcely be doubted that when it said in 1913 that the workmen's compensation law, which, prior thereto, was held to apply to the employees of all railroad companies, was amended so as to exclude employees of all railroad companies operating steam railroads as common carriers, it intended to exclude the employees of the *Railway Company* along with the employees of all other companies organized as railroad companies and doing business as common carriers. With the policy of the law we have nothing to do; that is a matter for the consideration of the legislature. There all parties in interest can be heard; here they cannot. We consider here the construction of the language used by the legislature. It is our duty to interpret, not to legislate. The words of the act are plain and unambiguous. While the *Railway Company* does not do all that some common carriers do, everything done by it is done as a common carrier; it is therefore operating a steam railroad as a common carrier.

We are referred to *Brooklyn E. D. Terminal v. U. S.* 239 Fed. 287, decided January 9, 1917, and to *U. S. v. Union Pac. R. Co.* 213 Fed. 332, as decisive of the question that the *Railway Company* is not a common carrier. It is there laid down that the test is whether or not shippers and consignees have contractual relations with the terminal. With all due deference, we do not think the test laid down is the correct test. We think the correct test is that stated in *Northwestern C. R. Co. v. Willcuts,* 140 Wis. 448, 122 N. W. 1048, and approved in *Tap Line Cases,* 234 U. S. 1, 24, 34 Sup. Ct. 741; that is, the right of the public to use the railroad's facilities and to demand service of it, rather than the extent of its business, is the real criterion determinative of its character. In this case the *Railway Company* cannot limit the right of any shipper to use its facilities, and the fact that the shipper must contract for its service through the agency of another company is immaterial. The fact that any shipper can make a contract by virtue of which the *Rail-*

bodies in regard to constitutional and legal questions. *Wis. Tel. Co. v. Railroad Comm.* 162 Wis. 383, 156 N. W. 614.

It is also argued that the appellant, by appearing before the *Industrial Commission,* waived his right to object to the jurisdiction of the *Commission.* If the *Industrial Commission* had no jurisdiction of the subject matter, which is the question here involved, there being no claim that the employee had accepted the provisions of the act as amended, the parties could not even by stipulation confer jurisdiction. 15 Corp. Jur. 802, § 101, and cases cited.

After the enactment of ch. 50 of the Laws of 1911 the *Railway Company* elected to come under the act. As the act then stood, this brought employees under the act unless they filed a withdrawal. The plaintiff never filed a withdrawal, but his employment with the *Railway Company* was intermittent, although during the greater part of the time since 1911 he has been employed by the *Railway Company.* The act as it stood at the time of plaintiff's injury provided that it should not apply to employees of a railroad company operating a steam railroad as a common carrier, "unless both employer and employee shall specifically in writing have voluntarily accepted the provisions of said sections [the compensation act] and have filed notice thereof with the industrial commission," etc.

Where the employment has not been continuous and no election has been filed by the employee subsequent to the amendment, the employee is not subject to the provisions of the act. Whether or not he would be if his employment had been continuous we do not decide. The fact that the plaintiff may have been under the compensation act by reason of the election of the *Railway Company* made prior to the amendment is not sufficient to place him under the act as amended, under the facts and circumstances in this case. It appears that the *Railway Company* has elected to be subject to the act as amended. If any one or all of the employees de-

way Company under its tariffs is obliged to render the service contracted for, is the material thing. This rule was laid down by this court prior to the enactment of the amendment in question, and we see no reason why it should be overruled or amended. Neither do we think the principle that a railroad may be a common carrier of merchandise, but is not a common carrier of common carriers of merchandise (*Donovan v. Pa. R. Co.* 120 Fed. 215, 61 L. R. A. 140, and *Pullman P. C. Co. v. Mo. Pac. R. Co.* 115 U. S. 587, 6 Sup. Ct. 194, and *Express Cases,* 117 U. S. 1, 6 Sup. Ct. 542, 628), is in any way applicable. The *Railway Company* contracts and holds itself out by its tariffs as being ready, able, and willing to perform the service of delivering to destination all persons and property delivered to it in cars, and for such service it receives compensation. Manifestly what it receives compensation for is the transportation of persons and property.

It appears that the *Railway Company* accepted the provisions of the workmen's compensation act, and that since its enactment many adjustments have been made with its employees in accordance with its provisions. While this practical construction of the act given it by the *Industrial Commission* might be of weight if the meaning of the statute were doubtful, a practical construction, however long adhered to, cannot override the plain terms of the statute. *Smith v. State,* 161 Wis. 588, 155 N. W. 109; *Burkhardt M. & E. P. Co. v. Hudson,* 162 Wis. 361, 156 N. W. 1011.

The trial court found itself bound by the established rule that findings of fact of the *Industrial Commission* must be upheld if supported by any substantial credible evidence. This is an incorrect application of the rule. The question involved here is not one of fact but of law. The amount of business done and the method of transacting it are questions of fact; whether the business so transacted is that of a common carrier or a private carrier is a question of law, and courts are not bound by the decisions of administrative

sire the benefit of the act, an election may be filed and notice given, and as to any injury occurring subsequently the act will apply.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment setting aside the award and directing dismissal of the application.

A motion for a rehearing was denied, with $25 costs, on April 29, 1919.

BASSETT, Respondent, vs. MILWAUKEE NORTHERN RAILWAY COMPANY, Appellant.

February 5—April 29, 1919.

Carriers: Interurban railway: Injury to passenger in collision: Contributory negligence: Riding in motorman's cab: Questions for jury: Evidence: Rule of company as to riding in cab: Damages: Future suffering: Inability to engage in pastimes: Instructions to jury: Reduction of award: Harmless error.

1. A person cannot be held to have been guilty of contributory negligence as a matter of law unless the proof is so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion.
2. A passenger upon an interurban car who, because it was crowded beyond its seating capacity and because of the boisterous conduct of its occupants, rode in the motorman's cab, which was inclosed so that he was as secure from being thrown off as he would have been had he occupied a seat in the passenger compartment, cannot be held, as a matter of law, to have been guilty, in so riding, of contributory negligence which would preclude a recovery from the railway company for injuries sustained in a head-end collision caused by the negligence of the motorman. *Miller v. C., St. P., M. & O. R. Co.* 135 Wis. 247, distinguished.
3. A rule of the railway company excluding passengers from the cab was not admissible in evidence in such case unless its purpose was to promote the safety of passengers and plaintiff had knowledge of its existence.
4. A statement in the charge that plaintiff was entitled to be compensated for "such pain and suffering, both mental and physical, if any, as it is reasonably certain he will suffer in the

future," was not misleading or prejudicially erroneous because the words "as the result of his injury" were not added, where the jury was told, at least twice, that the damages which could be assessed must be such damages as resulted or would result from the injury. *Howard v. Beldenville L. Co.* 129 Wis. 98, explained.

5. Plaintiff in a personal injury action may be awarded damages because of diminished capacity for enjoying life or because of "deprivations of the pleasures of life;" and it was not error in such a case to instruct the jury to consider the extent, if any, to which the injury had affected a young man's "ability to engage in pastimes."
6. Where injuries to a young man twenty-one years old resulted in the loss of his left leg and the thumb of his left hand and a permanent scar on his face, included other injuries, not permanent, to his head and side, and greatly handicapped him if they did not wholly incapacitate him for the vocation for which he was best fitted, an award of $16,000 (reduced by the trial court from $20,000) is *held* not excessive.
7. Where the error, if any, in the admission of evidence bearing solely on the amount of damages, was more than offset by the trial court's reduction of the jury's award, the judgment will not be reversed for such error.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

This action was brought to recover damages sustained by plaintiff on April 6, 1916, while riding on one of defendant's interurban cars, which collided with another car at Thiensville, Wisconsin. Plaintiff recovered and defendant appealed.

For the appellant there was a brief by *Bottum, Bottum, Hudnall & Lecher* of Milwaukee, and oral argument by *George B. Hudnall.*

For the respondent there was a brief by *Thompson, Myers & Kearney,* attorneys, and *Thomas M. Kearney,* of counsel, all of Racine, and oral argument by *P. J. Myers.*

The following opinion was filed March 4, 1919:

OWEN, J. The defendant operates an electric interurban railway between Milwaukee and Sheboygan, and one of the stations on its line is Port Washington. Between Milwau-

kee and Port Washington is a station known as Thiensville. At the time of the accident plaintiff was attending a school of engineering at Milwaukee. The school included in its course of study an annual trip to Port Washington for the purpose of inspecting power plants at that city. The school chartered a car of the defendant on April 6, 1916, to take the students upon this annual trip. Between sixty and sixty-five students made the trip. The car had seating capacity for fifty-two passengers. There were three compartments in the car. In the rear was a regular passenger compartment, next forward was a smoking compartment, and ahead of the smoking compartment was a cab, or baggage-freight-express-motorman's compartment. This will be hereafter referred to as the cab. It was seven feet eight inches long and approximately eight feet wide, and contained no seats. There is a self-locking door between the smoking compartment and the cab which is usually kept locked. In the cab were hinged platforms located on each side of the compartment which, when not in use, fold up and fasten to the sides of the car. When folded down they are high enough so that a milk can can go underneath them, and they may be used for seats. It was a single-end car, the forward end being entirely closed and kept closed when running; the only passenger entrance to the car being at the rear. On the trip from Milwaukee to Port Washington the conductor opened the door between the smoking compartment and freight compartment because there were not seats enough for all the passengers. Some of the passengers occupied the cab, some standing up and some sitting on these benches on the trip from Milwaukee to Port Washington.

Among the plants "inspected" at Port Washington were certain breweries, at which the crowd was cordially and hospitably received and entertained. These plants also proved of interest to the conductor and motorman, who joined the "inspection party" while at these plants. When it came time to start on their return trip some difficulty was experienced

in getting the students aboard; at least one had to be carried into the car. The conductor could not say how many were intoxicated, but he thought three quarters of them had been drinking beer. Some of them had been drinking pretty heavily, and their general condition was boisterous. The plaintiff had imbibed rather temperately, and upon the return trip was not in harmony with the prevailing exuberant spirit, and, as the car was crowded beyond its seating capacity anyway, he sought the solitude of the motorman's cab, where he rode until reaching Thiensville, when the car came into collision with another car and he sustained the injuries which will hereafter be referred to. This cab is as securely inclosed as any part of the car. There was no more danger of being thrown from that part of the car than the regular passenger compartment.

The negligence of the motorman was conceded. The defendant resists liability solely on the ground that the plaintiff was guilty of negligence as a matter of law in occupying the cab, and upon the authority of cases in some jurisdictions which hold that a person who is injured while riding on an open platform of an ordinary passenger car on a steam railway, there being seating, or, in some cases, standing, room inside the car, is guilty of negligence as a matter of law. This rule, it is claimed, was adopted and applied by this court in the case of *Miller v. Chicago, St. P., M. & O. R. Co.* 135 Wis. 247, 115 N. W. 794. We think that a careful perusal of that case will disclose that it was there held as a fact, and not as a matter of law, that plaintiff's deceased was guilty of contributory negligence. However, we will not discuss that case further than to suggest that it is doubtful whether it sustains the principle contended for by the defendant. The situation of the plaintiff here and of the deceased there is comparable to the extent that both were passengers on a common carrier conveyance, but there the similarity ends. We can see no similarity whatever between the risk assumed by the plaintiff in this case and the deceased in that. There the

deceased was riding on an open platform of a swiftly moving steam passenger train, in the nighttime, during or immediately after a severe rain storm, while here the plaintiff was riding within the inclosure of the cab, as secure from being thrown off as he would have been had he occupied a seat in the passenger compartment. The only extra risk to which he subjected himself by standing in the motorman's cab that could be suggested by appellant's counsel upon the argument was that, in case of collision, the front part of the car was necessarily the more dangerous. This would be true, perhaps, in case of a head-end collision, but in case of a rear-end collision he was safer in the front end of the car than he would have been in the passenger compartment. Furthermore, compared with the number of passenger cars and trains operated, collisions are very infrequent, and it can hardly be said as a matter of law that a person of ordinary intelligence and prudence boarding a passenger train or car should anticipate injury from such cause. If so, negligence would result from riding on them at all, as, in case of a collision, there is no safe or secure place in the car.

The dangers to which plaintiff exposed himself were not as great nor as obvious and apparent as were the dangers to which plaintiff's deceased was exposed in *Engen v. Chippewa Valley R., L. & P. Co.* 162 Wis. 515, 156 N. W. 460, where it was held that the question of deceased's contributory negligence in standing in the vestibule in the rear end of the car, in a space twenty-four by twenty-seven inches, very close to the edge of the platform next to the open door, where even a moderate swaying of the car in turning the curve might cause him to lose his balance and have a tendency to throw him off, was a jury question. Unless it can be said that plaintiff's "contributory negligence is so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion, or, as it is sometimes said, so clear and conclusive as not to admit, reasonably, of any opposing inference in unbiased and unprejudiced minds, the proper infer-

ence to be drawn must be determined by the jury." *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573, and cases there cited. We cannot say as a matter of law that plaintiff's conduct in taking up his position in the motorman's cab was inconsistent with that degree of care which would have been exercised by the great mass of men under the same circumstances. Consequently there was no error in submitting this question to the jury.

Appellant complains because it was not permitted to prove a rule of the company excluding passengers from the cab. The proffered evidence was not accompanied by an offer to prove that plaintiff had knowledge of the rule, nor was it suggested that the rule was adopted by the company out of consideration for the safety of passengers. Unless the purpose of this rule was to promote the safety of passengers, and its existence brought to the knowledge of the plaintiff, it was not admissible. The exclusion of this evidence was not error.

The defendant excepted to the following extract from the court's charge to the jury:

"You are instructed that you will name such sum as you find from a preponderance of all the credible evidence in the case, to a reasonable certainty, will be required to fairly and reasonably compensate the plaintiff in money for such loss of earnings and such pain and suffering, both mental and physical, as you are satisfied is chargeable to the injury, and also for such loss of earnings, if any, and the impairment, if any, of capacity to earn a livelihood in the future, as it is reasonably certain will result from the injury, and such pain and suffering, both mental and physical, if any, as it is reasonably certain he will suffer in the future."

It is contended that that part of the charge reading, "and such pain and suffering, both mental and physical, if any, as it is reasonably certain he will suffer in the future," is erroneous, in that future pain and suffering, both mental and physical, is not limited to such as it is reasonably certain would result from the injury. We do not think the jury

could have misunderstood the import of the language used. In the sentence quoted the court uses the expression, "as you are satisfied is chargeable to the injury," and, again, the expression, "as it is reasonably certain will result from the injury." The assumption that from the language used by the court in this part of its charge the jury understood that they were to allow for mental and physical suffering that plaintiff might sustain in the future, from whatever cause arising, is to our minds unreasonable. The jury was told, at least twice, that the damages which could be assessed must be such damages as resulted or would result from the injury. We cannot adopt defendant's construction, nor agree that, from the language employed, the jury was given to understand that damages resulting from future pain and suffering, mental or physical, were not limited to those resulting from the injury.

Upon this question appellant relies upon *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48. In the opinion in that case it is said:

"This instruction was given to the jury on the subject of damages: 'You will . . . assess all such sums as you are satisfied from evidence will recompense him for all future suffering, both mental and physical.' That was prejudicially erroneous. The jury should have been limited in assessing damages for future suffering, mental and physical, to such loss, in that regard, as the evidence satisfied them would be reasonably certain to result from the injury."

That was a correct statement of the law, and so much of the charge as is quoted in the opinion was subject to the condemnation there pronounced. Appellant, however, has employed the deadly parallel and set out in his brief all of the charge in *Howard v. Beldenville L. Co., supra,* bearing upon the question, in which the language condemned in that case appears in one column and the charge of the court herein in another. In reading the full expression of the trial court upon the question in the *Beldenville Case* it must be agreed

that there is no material difference between it and the charge here under consideration. Considered as a whole, the charge in the *Beldenville Case* does not seem to merit condemnation, as the language not quoted in the opinion relieves it of the vice therein attributed to it. It is quite plain that the modifying parts of the charge were not impressed upon the attention of the court. A careful study of the charge in the *Beldenville Case* convinces us that had the charge as a whole been called to the attention of the court it would have been approved. It is perhaps proper to say that in that case numerous errors aside from the one mentioned prompted a reversal of the judgment, and that the result was not dependent upon that particular feature of the charge.

Appellant also complains because the court instructed the jury that in awarding plaintiff damages they were to take into consideration "the extent, if any, to which it [the injury] had affected his ability to engage in pastimes." It is conceded by appellant that plaintiff in a personal injury action may be awarded damages because of "diminished capacity for enjoying life," or, as approved in *Benson v. Superior Mfg. Co.* 147 Wis. 20, 132 N. W. 633, because of "deprivations of the pleasures of life." Having conceded that damages because of "diminished capacity for enjoying life" is proper, we do not appreciate the force of the contention that in awarding damages the jury may not take into consideration "the extent, if any, to which it [the injury] had affected his ability to engage in pastimes." "Diminished capacity for enjoying life" is more comprehensive than "ability to engage in pastimes." Plainly the former includes the latter and more. The defendant was not injured by the use of the language employed.

The jury fixed plaintiff's damages at $20,000, which was reduced by the court to $16,000. Appellant insists that the damages are still excessive. As a result of the accident plaintiff was rendered unconscious. His left leg was crushed. The thumb on his left hand was crushed. He sustained a

cut on his cheek, from the corner of his eye to the bottom of his nose, about an inch and a half; his scalp, to the extent of about an inch and a half square, was taken off, and skin to the extent of about an inch square was rubbed off his left side just above the hip. He recovered consciousness while he was lying on the floor in the depot. He was placed on a car and was hurried to a hospital in Milwaukee, where his leg was amputated four inches above the knee, and the thumb of his left hand was amputated at the proximal joint. Two or three stitches were taken in his cheek and a bandage placed on his head. The injuries to his head and side were not permanent in character. His permanent injuries consist of the loss of his left leg, the thumb of his left hand, and a permanent scar on his face. He suffered two shocks, one at the time of the accident and the other at the time of the operation. At the time of the operation he was so weak as a result of the accident that a complete anæsthetic could not be administered. He was in a semiconscious condition during the amputations. The amputation of the left leg was not an ideal one. The stump is conical, and is likely to give the plaintiff more or less trouble unless there is another amputation of the leg higher up. Plaintiff experiences pain at certain times when the weather changes. It feels as if the foot is there and asleep. It causes him inconvenience when he does considerable walking. At the time of the accident plaintiff was twenty-one years of age. His education was acquired in the public schools, where he completed the ninth grade, and at St. Norbert's College, at De Pere, Wisconsin, which he attended for about a year and a half. He had done considerable work around the electric light plant at Lena, installing transformers, lightning arresters, wiring houses, etc., for which work he was paid $60 a month, including his board and room. He became interested in electrical work, and in February, 1916, he went to Milwaukee, where he attended a school of engineering. He seems to have been a serious-minded and ambitious young man,

possessing inherent mechanical ability. His injuries have greatly handicapped him in the matter of following a mechanical vocation, if indeed he is not entirely unfitted and incapacitated for such work. The door of opportunity, in the vocation for which by nature he is best fitted, is practically closed to him. There is no definite standard by which damages resulting from such injuries may be measured. Necessarily they rest largely in the discretion of the jury. Our sense of justice is not shocked by the amount to which the court reduced the damages in this case. We cannot say they are excessive.

Appellant preserved exceptions to the introduction of some evidence which we shall not treat in detail for the reason that, in our view of the case, they have but an academic interest here. Such evidence had a bearing solely on the amount of damages. A good deal of it consisted of expert testimony concerning matters of more or less general knowledge, and its influence upon the verdict of the jury could not have been substantial. If any error occurred in its admission it was more than offset by the reduction of the damages from $20,000 to $16,000. *Bakula v. Schwab,* 167 Wis. 546, 168 N. W. 378. We cannot reverse the judgment for this error because, as above stated, we feel that substantial justice has been done and the rights of appellant were not prejudicially affected by the admission of the evidence. Sec. 3072*m*, Stats.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on April 29, 1919.

SWOBODA, Appellant, vs. RUBIN and another, Respondents.

February 7—April 29, 1919.

Deceit: False representations as to value of property sold: Reliance thereon, when justified: Capacity of purchaser to form judgment: Damages: Evidence: Appeal: Remanding cause for judgment.

1. In an action based on false representations whereby plaintiff was induced to buy an interest in a corporation manufacturing knit underwear, although plaintiff participated in the taking of an inventory of the property of the company more than ten days before he parted with his money in making the purchase, findings by the jury to the effect that he did not have opportunity to observe and learn the condition and value of the machinery of the company and to find out for himself whether or not the business was profitable, and that he was justified in relying upon defendants' representations as to those matters, are *held* to be sustained by evidence showing that plaintiff had never had any experience with machinery and knew nothing about the knitting or underwear business or about books of account.
2. Opportunity to ascertain the truth of representations by the seller as to the value of property includes not only the element of time but also competency or capacity of the purchaser to form an intelligent judgment on the subject.
3. The substance of a transaction being the sale by two persons of a one-third interest in the property of a corporation controlled by them, the mere fact that they and the purchaser organized a new corporation, to which the property was transferred, said purchaser paying for one third of the stock of the new corporation, did not affect the right of the purchaser to recover damages on account of fraudulent representations, made by the sellers, which induced his purchase.
4. In an action for deceit, because of uncertainties resulting from failure to return certain exhibits with the record, the supreme court is unable to determine whether the verdict upon the question of damages is supported by the evidence; and the cause is remanded for the entry of judgment in the trial court for such damages as are sustained by the evidence, not exceeding the amount found by the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

This is an action for damages growing out of false representations alleged to have been made by the defendants to the plaintiff, which induced him to invest $8,300 in the Racine Underwear Mills. The plaintiff was born in Austria, came to this country about thirty-two years ago, and for the last twenty-five years has been in the restaurant, saloon, and hotel business, principally in the city of Milwaukee, in which business he accumulated some money. The Racine Underwear Mills Company was a corporation organized under the laws of the state of Wisconsin in March, 1914. Its business was the manufacture of knit underwear. Its plant and principal place of business was located at Stevens Point, Wisconsin. In March, 1915, it was owned and controlled by the defendant *Braun* and one Leo. It was in serious financial difficulties. In June, 1915, *Rubin* advanced the concern $3,000, and as security took a bill of sale of all the assets and resources of the company. Later on there was assigned to him as additional security $13,300 of the capital stock of the corporation. The total capital stock thereof was $25,000. This gave *Rubin* a controlling interest in the corporation and thereafter he was the dominating spirit therein.

In July, 1915, the plant was moved to Milwaukee. This required more money, which was advanced by *Rubin*. After the plant resumed operations in Milwaukee it was still in financial straits, and *Rubin* determined to get more capital for the concern. On or about October 9, 1915, the plaintiff and *Rubin* met. *Rubin* told *Swoboda* he heard that he wanted to go into business. He answered that he did if it was a good business. *Rubin* then said I have one, the Racine Underwear Mills, a good profitable business, and I need a good responsible man in the office. Upon plaintiff asking how much money was needed *Rubin* answered that that was not the question. What he wanted was a good responsible man and he knew plaintiff was such a man. Plaintiff told him he knew nothing about the business, and *Rubin* replied that it was not necessary; that it was a very profitable busi-

ness; that the money was not the prime consideration; that he *(Rubin)* was the financier and owned the whole thing. After some further talk and an inspection of the plant an inventory was taken, either the same day or very shortly thereafter. *Braun* and *Swoboda* were present at the taking of the inventory, and *Rubin* was there a considerable portion of the time. The principal items of the inventory consisted of yarn and machinery. The yarn was weighed up and the value thereof set down. The machinery was valued at the prices fixed therefor in a catalogue of the manufacturer of the machinery issued in the year 1913. The evidence tends to show that both *Rubin* and *Braun* assured plaintiff that the machinery was as good as new. The machinery was inventoried at $15,265.51 and the yarn at $4,390.18. By this inventory the entire value of the plant was fixed at $23,500, but what items were included in this total outside of the yarn and machinery does not appear. It is reasonably certain that a considerable sum was allowed for good will.

It was then arranged to organize another corporation, with a capital stock of $25,000, of which *Swoboda, Rubin,* and *Braun* should each take $8,300, leaving $100 of the stock in the treasury, to which the property of the old corporation should be transferred at the inventoried value. Articles of incorporation were drawn up and filed, and on October 22d the three met and organized the corporation. *Swoboda* drew and delivered his check to the corporation for $8,300. *Rubin* and *Braun,* in form at least, did likewise. These checks were deposited in the Union Bank, of which *Rubin* was a director. *Rubin,* by bill of sale, conveyed to the new corporation all the property and effects of the old corporation, and a check for $23,350 upon the deposits so made in the Union Bank was immediately delivered to *Rubin* in payment thereof. This left the corporation a checking account of about $1,500. It appeared that there were outstanding debts of the old organization amounting to $6,750 for which *Rubin*

was liable, and which were paid out of the $23,350 above mentioned, all of which was unknown to the plaintiff.

Rubin, Braun, and *Swoboda* were elected directors. *Rubin* was elected president, *Braun* secretary, and *Swoboda* treasurer. *Swoboda* was given a desk and charged with the somewhat responsible duties of copying orders and signing checks. *Braun* went out on the road soliciting orders. Things went badly from the start. Orders filled were returned because unsatisfactory. The bank account was continually overdrawn. *Swoboda* was asked to sign notes to secure money for the concern, one of which for $1,000 he signed. The machinery worked badly, resulting in a poor product. The employees left. Credit was refused. Plaintiff demanded that his money be returned. At a stockholders' meeting on January 10, 1916, plaintiff was removed as a director. In March, 1916, *Rubin* sold his interest at par and severed his connection with the corporation. In July, 1916, the corporation went into bankruptcy. This action was brought to recover damages because of the false and fraudulent representations of the defendants which induced plaintiff to invest his money, as recited.

The jury returned a special verdict to the effect (1) that prior to October 22, 1915, the defendants, and both of them, represented to the plaintiff (a) that the Racine Underwear Mills was doing a good and profitable business; (b) that the machinery of the Racine Underwear Mills was as good as new machinery; (c) that the true value of the equipment, stock, fixtures, machinery, and good will of the Racine Underwear Mills was $23,350; (2) that such representations were false and fraudulent and made with the intent to induce plaintiff to buy stock in the Racine Underwear Mills; (3) that the plaintiff believed such representations; (4) that the plaintiff relied upon such representations and was thereby induced to purchase stock of the Racine Underwear Mills; (5) that the plaintiff did not have opportunity to observe and

learn the condition and value of the machinery of the Racine Underwear Mills prior to October 22, 1915, or as to whether or not the business of the Racine Underwear Mills was profitable; (6) that the plaintiff was justified in relying upon said representations and in accepting such representations as true, without doing more than the evidence in the case indicates he did do to ascertain the truth or falsity of such representations; and (7) fixed his damages at the sum of $6,750.

The court held that the plaintiff did have opportunity to learn the condition and value of the machinery of the Racine Underwear Mills and as to whether or not its business was profitable prior to October 22, 1915, and that the plaintiff was not justified in relying upon such representations, reversed the findings of the jury in such respects, and ordered judgment in favor of the defendants dismissing the complaint. From the judgment so entered plaintiff appealed.

For the appellant there was a brief by *Umbreit, Mahon & Jenner,* attorneys, and *A. C. Umbreit,* of counsel, all of Milwaukee, and oral argument by *A. C. Umbreit.*

For the respondent *Rubin* there was a brief by *McGovern, Hannan, Devos & Reiss,* attorneys, and *George C. Dutcher,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Timothy J. Hannan* and *Mr. Dutcher.*

The following opinion was filed March 4, 1919:

OWEN, J. In the case of *Karls v. Drake,* 168 Wis. 372, 170 N. W. 248, recently decided by this court, following *Miranovitz v. Gee,* 163 Wis. 246, 157 N. W. 790, it was held that, in the absence of an express intent to defraud, the determination of whether or not certain representations are statements of facts or of opinion depends upon whether or not the person to whom the representations are made may, under all the facts and circumstances of the case, including such person's capacity or want of capacity, rely upon them. Where the person to whom they are made may rely upon them, they are held to be statements of fact. Where the per-

son to whom they are made may not rely upon them without being guilty of a want of ordinary care and prudence, they are denominated opinions. It was also there held that whenever there is any doubt as to whether a statement of this kind is the mere expression of an opinion or that of a fact, it must be determined by the jury or court. See, also, upon this point, *J. H. Clark Co. v. Rice,* 127 Wis. 451, at page 465, 106 N. W. 231, and cases there cited. It was also held in *Karls v. Drake, supra,* that a finding of the jury to the effect that, under all the circumstances of the case, the plaintiff was justified in relying upon the representations made, was equivalent to a finding that the statement or representation made was a representation of a fact. In the instant case the special verdict of the jury finds in plaintiff's favor all facts essential to his recovery, and it remains but to ascertain whether the findings of the jury are sustained by the evidence.

The trial court was of the opinion that the finding of the jury to the effect that the plaintiff did not have opportunity to observe and learn the condition and value of the machinery of the Racine Underwear Mills and to find out for himself whether or not the business of the Racine Underwear Mills was profitable, was not sustained by the evidence. It appears from its opinion that it was induced to this conclusion by reason of the fact that *Swoboda* participated in the taking of the inventory, and that he had plenty of opportunity between that time and October 22d, when he parted with his money, to advise himself concerning the value of the assets of the concern and upon the question of whether the business thereof was profitable or otherwise. In the argument respondents' attorney contended that if there ever was a case where a purchaser had an opportunity to advise himself concerning the value of that which he was purchasing, this was the case. So far as the element of time was concerned, the contention is conceded. But opportunity to ascertain the truth of representations such as those forming the basis of

this action contemplates something besides the element of time. It contemplates competency on the part of the purchaser to form an intelligent judgment of his own upon such questions.

"It is the settled doctrine of English and American law that the purchaser is required to notice such qualities of the goods purchased as are reasonably supposed to be within the reach of his observation and judgment." Bouv. Law Dict. (Rawle's 3d Rev.) 438.

In formulating the rule in *Miranovitz v. Gee, supra*, by which certain representations are determined to be statements of fact or expressions of opinion, the capacity or want of capacity of the person relying upon them is made an essential consideration. It is true that the purchaser must exercise such faculties as he has for his protection. He cannot close his eyes to the obvious, nor stifle his judgment of matters within his capacity to judge. In fact, he must be alert, careful, and cautious. He must employ his powers of observation and apply his experience and knowledge in his efforts to ascertain the facts and to form an intelligent judgment upon the character and value of the subject of his purchase. But one who is not equipped to form an intelligent judgment with reference thereto, or to deal at arm's length with his adversary, is not forbidden to do business. In many of the transactions of life purchasers must rely upon the representations of sellers concerning value, for we all at times indulge in purchases concerning the values of which we are wholly uninformed. If under such circumstances sellers were not held to their representations concerning values, the law would license deceit and reward dishonesty.

Swoboda was a man who had never had any experience with machinery, especially knitting machinery. He was equally innocent concerning the knitting or underwear business. He was utterly without experience concerning books of account, and such examinations as he could have made of the books of the concern would have revealed nothing to him.

He had no knowledge upon those matters and, consequently, could exercise no judgment with reference thereto. This was known to the defendants. Because of *Swoboda's* lack of knowledge upon the subjects of these representations the jury was entirely justified in finding as it did, and its verdict should not have been disturbed. Our conclusion is that the trial court erroneously interfered with the verdict of the jury, and that it should have rendered judgment in favor of the plaintiff for such damages as were justified by the evidence.

We do not consider the intervention of the new corporation as changing the substantial nature of the transaction, which was a sale to *Swoboda* by *Rubin* and *Braun* of a one-third interest in the property transferred. We say this because the trial court in its opinion intimated that the result might have been different if the action had been by the corporation instead of the plaintiff. The direct result of this transaction was the defrauding of *Swoboda* by *Rubin* and *Braun*. Their destination was as certainly reached, notwithstanding their circuitous route, as though the sale had been made direct to him and not through the intervention of a corporation.

It is vigorously contended that the evidence does not sustain the damages fixed by the jury. *Swoboda* should recover the difference between the market value of the property transferred and its value as represented. Whatever was transferred was represented to be of the value of $23,350. We know of only two items entering into this total, namely, machinery inventoried at $15,260 and yarn inventoried at $4,390. A copy of the inventory was used upon the trial, but not returned to this court, so that we are unable to ascertain all the items that went to make up the total. One of plaintiff's witnesses testified that the machinery, valued at $15,260, was not worth more than $5,000. If believed by the jury, and it apparently was, this justifies a reduction of $10,260 from the inventoried price. We also gather, in a

general way, from the record that some value was placed on good will. Whatever that value was, the jury was entitled to disregard it altogether, and evidently did.

Appellant's attorneys also contend that debts of the old concern were paid by the new concern. We cannot verify this by the record. There were some eleven checks offered, as exhibits, in evidence which, it would appear, were for the payment of the debts of the old concern. These exhibits, however, were not returned with the record, and we cannot tell whether these were checks of the new corporation or *Rubin's* individual checks. Because of these uncertainties appearing from the record, and because the trial court has not passed upon the question, we feel that we are not in a position to pass upon the question as to whether the verdict of the jury upon the question of damages is supported by the evidence, and that the case should be remanded with instructions to enter judgment in favor of the plaintiff for such amount as may be sustained by the evidence, not exceeding, of course, the amount found by the jury.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in favor of the plaintiff for such damages as are sustained by the evidence, not exceeding the amount found by the jury.

A motion for a rehearing was denied, with $25 costs, on April 29, 1919.

CAMPBELL, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

February 7—April 29, 1919.

Carriers: Rules and regulations: Enforcement: City passenger excluded from interurban car: Action for damages: Question of franchise not involved: Reasonableness of rules: Railroad commission.

1. A common carrier of passengers may adopt reasonable rules and regulations for the management of its business and use the necessary amount of force to secure their observance.
2. A company which operated both urban and interurban cars upon the streets of a city had the right to make and enforce a rule by which the interurban cars were reserved for interurban traffic only and city traffic excluded therefrom, such a separation of urban and interurban service having been approved as proper by the railroad commission.
3. One who, in the enforcement of a rule excluding urban traffic from interurban cars, was prevented, in a city, from entering and becoming a passenger in an interurban car, cannot, in an action for damages based on such exclusion, test the question whether the company had a proper franchise for the running of its interurban cars on the street in question.
4. Any question as to the reasonableness of such a rule should be determined first in a proceeding before the railroad commission, before resort is had to the courts.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

The appeal is from a judgment dismissing plaintiff's complaint.

The plaintiff seeks to recover damages as a result of having been forcibly prevented from entering one of defendant's cars by the conductor in charge. On May 18, 1916, the plaintiff attempted to become a passenger, being ready to pay his fare, on one of the cars used by defendant in interurban traffic between Kenosha and Racine to and into the city of Milwaukee. It had been running such cars for more than twenty years between such points, Milwaukee being the northern terminus. Some time prior to the occurrence com-

plained of the defendant had filed with the railroad commission of this state its printed schedule of its rules as to the conduct and management of such interurban cars on this line. Among such provisions was one to the effect that north-bound trains must not stop to pick up passengers after passing Kinnickinnic and Pryor avenues in said city of Milwaukee. This designated point was south of the place where plaintiff sought to enter this north-bound car, thus making the place of such proposed entry within the territory covered by such excluding regulation. The place of attempted entry was at a street crossing in the city of Milwaukee which was a regular stopping place for such interurban cars and where they discharged passengers who came from outside the city, and it was also a regular stopping place for both the receiving and discharging of passengers on its urban cars, which also used the same tracks. Plaintiff was informed by defendant's conductor that he could not be permitted to enter because of the rules of the defendant prohibiting such purely urban traffic. Plaintiff had known of such regulation before, although on some prior occasions he had been permitted to ride on such cars in spite of such rule.

The complaint alleged that the defendant had no right, license, permission, or authority whatever to run cars upon the street in question other than obtained by two certain franchises of the city of Milwaukee of December 28, 1874, and January 16, 1888, respectively. The plaintiff alleged, upon information and belief, that the defendant had issued orders to its conductors not to permit city passengers to ride upon said car from which plaintiff was ejected, and that defendant had unlawfully and illegally issued an order that such cars should be reserved exclusively for persons taking passage thereon outside of the city limits of the city of Milwaukee and in other cities and elsewhere, and that in such forcible ejecting of the plaintiff the conductor was obeying the instructions of the defendant.

Plaintiff learned, subsequent to his attempting to board

this car, that there was or might be no franchise from the city giving to the defendant the right to run such interurban cars over the street in question. The trial court, in submitting the case to the jury, instructed them as follows:

"You will assume that the conductor had a right to resist plaintiff's attempt to board the car, and in so doing had the right to use such force as was reasonably necessary under the circumstances as disclosed by the evidence in the case to accomplish such purpose."

The jury found that the conductor did not use more force than was reasonably necessary to eject the plaintiff from the steps of the car upon which he stood while the car stopped at the crossing in question. Upon such finding the court directed judgment to be entered dismissing the action on the merits. From such judgment the plaintiff appealed.

For the appellant there was a brief by *Schoetz, Williams & Anderson* of Milwaukee, and oral argument by *Clifton Williams.*

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

The following opinion was filed March 4, 1919:

ESCHWEILER, J. The substance of plaintiff's contention in this case is based upon the proposition asserted by him that, there being no franchise granted by the city of Milwaukee to defendant to run its interurban cars upon the street in question, such cars, when so running on the street, must be considered, so far as prospective passengers are concerned, as urban cars, and required, therefore, to carry persons who desire to be transported from one point in the city of Milwaukee to another reached by such car in the same manner as such urban cars, and subject to all the regulations as to the taking on or discharging of city passengers that apply to the regular urban service of the defendant.

The plaintiff, however, cannot test by force, nor have de-

termined in this action, whether or not the defendant is running its interurban cars on the streets of the city of Milwaukee under a proper franchise or not. He has not been injured by reason of the defendant's use of the streets, but only, if at all, because the defendant, while using the streets, denied him his claim of right to take advantage, as a passenger, of the very use that was being made of the streets by the defendant as a common carrier.

He does not come into court as the owner of property adjacent to this car line whose real estate has been depreciated in value, or right in connection with such ownership invaded, as was the situation in *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 126 N. W. 26; nor has he sustained personal injury by reason of defendant's use of the street, as in *Daly v. Milwaukee E. R. & L. Co.* 119 Wis. 398, 96 N. W. 832.

The rule of defendant which its employee was seeking under its direction to enforce, by which such interurban cars were reserved for interurban traffic only and city traffic excluded therefrom, was a regulation that the defendant as a common carrier had the right to make, and was, under the situation disclosed in this case, at least a reasonable one. Such regulation has been submitted to the tribunal in this state which is clothed with full power to determine whether such a regulation was a proper one or not. That tribunal, the railroad commission, has passed upon such a system of proposed restricting urban from interurban service and adopted the view that it may be properly done. *Racine v. Milwaukee E. R. & L. Co.* 12 Wis. R. R. Comm. Rep. 388; *Kenosha v. Kenosha E. R. Co.* 12 Wis. R. R. Comm. Rep. 508.

That a common carrier of passengers may adopt reasonable rules and regulations for the management of its business and use the necessary amount of force to secure their observance is beyond question. *Coombs v. Southern Wis. R. Co.* 162 Wis. 111, 155 N. W. 922; *Ellis v. Milwaukee City R. Co.* 67 Wis. 135, 30 N. W. 218; *Plott v. C. & N. W. R. Co.*

63 Wis. 511, 23 N. W. 412; *Yorton v. M., L. S. & W. R. Co.* 54 Wis. 234, 11 N. W. 482; *Garricott v. N. Y. State Rys.* 223 N. Y. 9, 119 N. E. 94; *Sullivan v. Boston E. R. Co.* 199 Mass. 73, 84 N. E. 844; *Ohage v. N. P. R. Co.* 200 Fed. 128.

If the defendant is operating its interurban cars on the streets of the city of Milwaukee without proper right or authority, the law has provided orderly proceedings to determine that question.

If the defendant as a common carrier is attempting to enforce and carry out unreasonable and improper regulations, to the detriment of the general public, the state has provided for summary proceedings and a speedy determination of such questions before the railroad commission of this state, and even the courts are required, at least in ordinary situations, which would certainly cover the one in question here, to yield the prior right of determination to such tribunal. *State ex rel. Superior v. Duluth St. R. Co.* 153 Wis. 650, 142 N. W. 184.

No good reason appears why at least the same amount of self-restraint as to course of procedure should not be expected from an individual situated as was the plaintiff in this case.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on April 29, 1919.

HOLUB, Appellant, vs. COOTWARE and another, Respondents.

February 7—April 29, 1919.

Appeal from judgment of circuit court: Review of order reversing judgment of civil court: New action: Automobiles: Injury to person in street: Contributory negligence: Violation of city ordinance: Verdict: Impeachment by affidavits of jurors.

1. Where, after a judgment of the Milwaukee civil court was reversed and a new trial ordered in the circuit court, plaintiff commenced a new and independent action in the circuit court, against an additional defendant, and for an amount over which the civil court had no jurisdiction, he cannot, by including in the notice of an appeal from the judgment in the new action an appeal from the order reversing the judgment of the civil court in the original action, obtain a review of such order. [Whether, upon an appeal from a judgment of the circuit court, the supreme court will review an order of that court reversing a judgment of the civil court *in the same action,* not determined.]
2. A load of kindling wood had been dumped, in front of plaintiff's house, partly in the street, and while he was in the street, after dark, putting some of the wood in a basket to carry it to his basement, he was struck and injured by an automobile. Upon evidence that he had failed to comply with a city ordinance which required that a light be displayed on the wood after it became dark, it is *held* that the jury were warranted in finding that he was guilty of negligence which proximately contributed to the accident.
3. Upon a motion for a new trial, a verdict finding plaintiff guilty of contributory negligence cannot be impeached by affidavits of jurors to the effect that they misunderstood a question in the special verdict and that they never intended to convict plaintiff of such negligence.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

This is an action brought to recover damages for personal injuries resulting from an automobile accident. On October 12, 1916, plaintiff procured a load of kindling wood to be delivered in front of his house in the city of Milwaukee. The wagon in which the wood was delivered backed up to the curb in front of plaintiff's house and the wood was

dumped out of the rear end. It fell on both sides of the curb, some being between the curb and the sidewalk and some out in the street from the curb. It was late in the evening, and plaintiff immediately started to carry it to his basement in a basket. While he was in the street putting wood in his basket, in a stooping posture, he was struck by defendant's automobile and sustained certain injuries.

Action was brought against the defendant *Peter Cootware* in the civil court of Milwaukee county, resulting in plaintiff's recovery. The complaint in that action prayed for a recovery of $2,000. The defendant then appealed to the circuit court, where the judgment of the civil court was reversed and a new trial in the circuit court was ordered. Thereupon plaintiff commenced this action against *Peter Cootware* and the *Automobile Liability Company* in the circuit court, praying for a recovery of $5,000. A special verdict was returned in which the defendant *Cootware* was found guilty of negligence which constituted the proximate cause of the accident. The plaintiff was also found guilty of contributory negligence which proximately contributed to the accident. Upon this verdict the court granted judgment in favor of the defendants. From the judgment so rendered plaintiff appealed.

For the appellant there was a brief by *Raymond J. Cannon,* attorney, and *Glicksman, Gold & Corrigan,* of counsel, all of Milwaukee, and oral argument by *Mr. Walter L. Gold* and *Mr. Cannon.*

J. Elmer Lehr of Milwaukee, for the respondents.

The following opinion was filed March 4, 1919:

OWEN, J. The notice of appeal in this case states that plaintiff appeals from the order made and entered "in this action by said court on the 8th day of December, 1917, by which order the judgment of the civil court rendered in favor of the plaintiff and against the defendants in this action was reversed and ordering that the action be tried in this court by a jury, and also from the whole of the judgment made and

entered in this action by said court on the 20th day of April, 1918." We are asked to review the order of the circuit court by which the judgment of the civil court in the original action of Holub v. Cootware was reversed. Whether upon an appeal from the judgment of the circuit court for Milwaukee county this court will review an order of that court reversing the judgment of the civil court in the same action is a question that has not been determined. A somewhat similar question was, however, considered in *Bonnell v. C., St. P., M. & O. R. Co.* 158 Wis. 153, 147 N. W. 1046, but whether what was there said is decisive of this question we do not decide. The question is not here presented, for the reason that after the judgment rendered in the civil court in Holub v. Cootware was reversed by the circuit court, this new and independent action was commenced in the circuit court. We are really at a loss to understand the position of counsel for appellant in this matter. He seems to assume that this action is the same action that was originally started in the civil court, and it is not altogether clear that it was not so regarded by the circuit court, as a plea in abatement filed by the defendant *Cootware*, in which the pendency of the former action was pleaded, was overruled by that court. However, there can be no doubt that this is a new, separate, and independent action, brought in another court, against different parties, and asking for the recovery of an amount over which the civil court has no jurisdiction. A mere statement of this situation is sufficient to indicate that we cannot on this appeal review an order of the circuit court reversing the judgment rendered in the civil court in the original action brought in that court.

The jury found that plaintiff was guilty of contributory negligence which proximately contributed to the accident. Appellant insists that this finding of the jury is not supported by the evidence. An ordinance of the city of Milwaukee, introduced in evidence upon the trial, provides that "Sufficient lights shall be displayed and maintained during the whole of every night at each excavation, pile of material,

fence, or other obstruction on any public highway to so cast their rays that such excavation, pile of material, fence, or other obstruction shall be in full view of the public." There was testimony in the case that the pile of wood was six feet along the curb, extending out in the street seven feet, and was three and one-half feet high in the center of the pile. The son-in-law of the plaintiff testified that he was at the plaintiff's house shortly after the accident and that the wood-pile could not have extended into the street more than a yard and that there were, at the most, twelve baskets of wood in the street then. It therefore pretty conclusively appears that there was more or less wood in the street. It appears that the accident occurred October 12, 1916, somewhere around 6 o'clock in the evening, and that it was dark at the time. The jury had a right to find that the ordinances of the city of Milwaukee required that a light should be displayed upon this wood after it became dark. If so, failure to comply with the ordinance constituted negligence which the jury could find proximately contributed to the accident and the injury. *Yahnke v. Lange,* 168 Wis. 512, 170 N. W. 722. The verdict of the jury in this respect was supported by the evidence.

Appellant further contends that a new trial should have been granted for the reason that the jury, or some of them, did not understand the ninth question, which related to the contributory negligence of the plaintiff, as appeared by the affidavits of two jurors which were filed in support of the motion for a new trial. Each affidavit is to the effect that affiant "was one of the jurors in the above entitled case and that the ninth question of the special verdict was so worded that it was misleading, and that as one of the jurors he never intended to convict the plaintiff of contributory negligence, and if he had so understood it he would not have consented to the verdict as returned into court." The court refused to consider said affidavits in deciding the motion for a new trial.

Appellant strenuously contends that the court should have

considered the affidavits thus presented, and likens the situation to that considered in *Shaw v. Fisk,* 21 Wis. 368, where the verdict of the jury was set aside because it appeared by affidavits that two of the jurors did not understand the English language. That went to the competency of the jurors to act at all. The affidavits presented did not tend to impeach the verdict of the jury. "The general rule is very ancient and often reiterated that the statements of the jurors will not be received to establish their own misconduct or to impeach their verdict." *Butteris v. Mifflin & Linden M. Co.* 133 Wis. 343, 113 N. W. 642; *Wolfgram v. Schoepke,* 123 Wis. 19, 100 N. W. 1054; *Owen v. Portage T. Co.* 126 Wis. 412, 105 N. W. 924; *Hempton v. State,* 111 Wis. 127, 86 N. W. 596; *Imperio v. State,* 153 Wis. 455, 141 N. W. 241; *Dishmaker v. Heck,* 159 Wis. 572, 150 N. W. 951. If verdicts thus may be impeached they have little stability. If they cannot stand because a juror is willing to say that he misunderstood a question of the special verdict they must, by the same logic, be set aside upon a statement of a juror that he did not understand the court's charge or obtained a mistaken impression of certain testimony. As said in *Dishmaker v. Heck, supra:* "Any such rule would place every verdict at the mercy of weak or corrupt jurymen." Verdicts must be given greater dignity and finality than would be accorded them under such practice. Their impeachment cannot be permitted in the manner here attempted.

Appellant preserved a number of exceptions to the charge of the court which are assigned as error. These alleged errors have received our careful consideration. The criticisms thereof seem to be without merit. They do not call for special treatment.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on April 29, 1919.

HEINDEL, Respondent, vs. WISCONSIN TRACTION, LIGHT, HEAT & POWER COMPANY, Appellant.

December 3, 1918—April 29, 1919.

Damages: Personal injuries: Jury's award; when reduced: Discretion: Excessive damages.

1. If, in an action for personal injuries, there was competent credible evidence which supports the jury's award of damages and is not overcome by evidence, facts, or circumstances which clearly show that less damages were sustained, the award must stand, especially where the trial court is satisfied that the jury was an intelligent and impartial one and acted without bias or prejudice, and has approved the award. Such an exercise of the discretion of the trial court will not be disturbed on appeal except for a manifest abuse of discretion.
2. This court declines in this case to disturb an award of $5,500, approved by the trial court, for injuries to a healthy girl of twenty-one years, who was at the time employed in domestic service, such injuries having resulted in traumatic neurosis which will either be permanent or will last a number of years, causing disability and much pain and suffering, and entailing large expenditures, both past and future, for doctor's bills, hospital expenses, etc.

APPEAL from a judgment of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

Action to recover damages for personal injuries sustained in a collision between two of defendant's cars. Plaintiff, a young girl twenty-one years of age, claimed that by reason of the shock and fright suffered in the collision her nervous system has been permanently injured, and there is medical testimony to sustain her claim. The defendant contends that she will fully recover in a short time, and doctors sustained that contention by testimony given upon the trial. The jury returned a general verdict in favor of plaintiff and assessed her damages at $5,500. From a judgment entered accordingly defendant appealed.

Lawrence A. Olwell of Milwaukee, for the appellant.

For the respondent there was a brief by *Ryan, Cary & Frank* of Appleton, and oral argument by *Julius P. Frank.*

VINJE, J. Upon the record in this case as first presented this court was of the opinion that the trial court had not passed upon defendant's motion to reduce the damages, and the record was returned with directions to the trial court to pass upon and decide the motion to reduce the damages found by the jury. This the trial court has now done by an order denying the motion. That leaves the whole case for a determination of all the questions raised by the appeal. The defendant has assigned a number of errors relating to the reception of testimony over its objection and to errors in the charge to the jury. None of these are well taken and none seem of sufficient importance to require treatment in an opinion. It is also claimed that the damages assessed by the jury should be reduced. This is the most serious question in the case and one not free from doubt. The jury dispensed damages with a liberal hand, and this court would have been better satisfied had a smaller sum been awarded. But that is not the test. If there is competent credible evidence in the case which will support the award and which is not overcome by evidence, facts, or circumstances which clearly show that less damages were sustained the award must stand, especially so where, as here, the trial court is satisfied that the jury was an intelligent and impartial one and acted without bias or prejudice, and has approved the award. The discretion of the trial court exercised in a matter of this kind will not be disturbed unless it is manifest there has been a judicial abuse of such discretion. We cannot say that there has been such abuse in this case.

The substance of the evidence tending to sustain the award is as follows: Plaintiff is suffering from traumatic neurosis and her injury is either permanent or will last a number of years. At the time she was injured, May 13, 1917, she was earning $5 per week, with board and lodging, as a domestic servant, and was and had been healthy and weighed 140 pounds. At the time of the trial in January, 1918, she

weighed only 117½ pounds. She had suffered severe pain in her spine most of the time since her injury and such pain continued at the time of the trial, and was aggravated by mental effort such as reading and by physical effort. She had been unable to do any remunerative physical work, and at the time of the trial could walk only in a slow, halting, hesitating manner and with apparent great effort. She slept poorly and would often be awake for long periods, especially in the early part of the night. Up to the time of the trial she had expended over $600 in doctor's bills, hospital expenses, and medicine, and the evidence showed she would have future expenses of a like kind as well as for board and lodging, besides the loss of wages. In view of this evidence, which the jury had a right to believe, and in view of the trial court's approval of the award, we do not feel justified in reducing it.

By the Court.—Judgment affirmed.

STATE EX REL. CITY OF MILWAUKEE, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

February 5—April 29, 1919.

Public utilities: Street railways: Power of railroad commission to order extensions: Streets: Power of municipal corporation to grant street franchises: Statutes: Construction: Amendments: Constitutional law: Impairment of contract obligations: Change of remedy.

1. Sec. 1863, Stats., giving the railroad commission jurisdiction to determine the necessity of extending the line of any street railway corporation operating "within any municipality," applies to street railroads, and not exclusively to interurban or suburban railroads, in view of the amendment introduced by ch. 565, Laws 1917.
2. An amendment to a statute must be construed with reference to the other provisions of the statute amended.

3. In the absence of a clearly expressed legislative intent it will not be presumed that the legislature intended to withdraw from municipalities the power to grant a franchise for the occupation of city streets conferred upon city councils by sec. 1863, Stats., as amended by ch. 565, Laws 1917.
4. A statute will be construed as a whole, and effect given to every part thereof.
5. Sec. 1863, Stats., as amended by ch. 565, Laws 1917, must be construed to require a street railway corporation operating within a municipality to construct its railway upon such streets as the municipality may have designated by franchise or otherwise, 'if public convenience and necessity require such extension, giving to the railroad commission power to determine whether public convenience and necessity require the proposed extension and making the procurement of the certificate of convenience and necessity from the railroad commission a condition precedent to the right of the municipality to compel the construction of the extension.
6. Changing the remedy by which a right under a contract is enforced does not impair the obligation of the contract.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Mandamus to compel defendant to extend its lines of railway upon certain streets in the city of *Milwaukee.* The plaintiff seeks to compel the extension of a double-track street railway upon Mitchell street in the city of Milwaukee from the intersection of Mitchell street with Forest Home avenue over the route indicated in the map on page 185 to the intersection of Burnham street with Twenty-sixth avenue. The existing lines of railway are also indicated on the map. The defendant company is operating under a franchise granted by the plaintiff city on January 2, 1900, that part material here being as follows:

"Provided, further, that in case of the extension of the city limits in the future, then said railway company is hereby authorized and obligated to make extension of any of its lines now or hereafter reaching the city limits as they now exist to the said city limits when so extended, and in case said railway company shall refuse or neglect to so extend its lines

State ex rel. Milwaukee v. Mil. E. R. & L. Co. 169 Wis. 183.

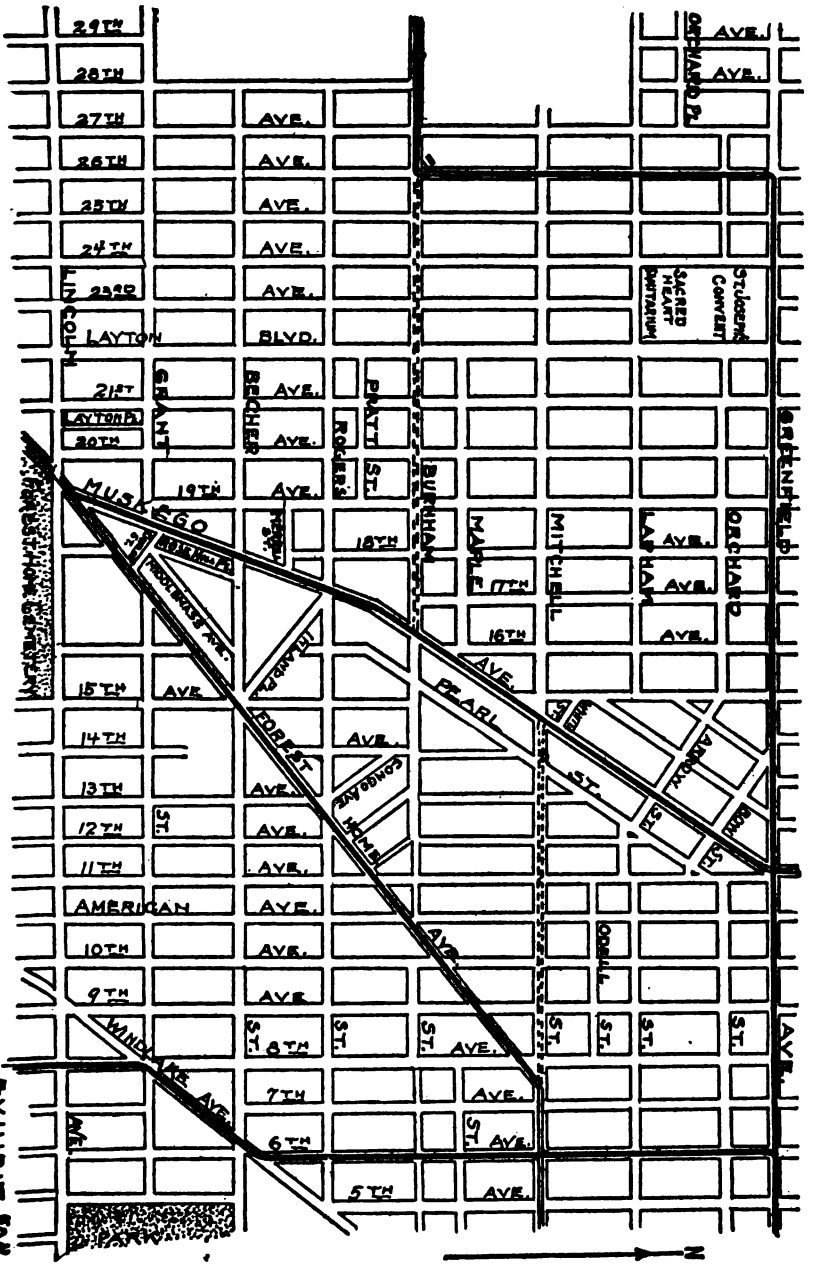


EXHIBIT "A"

on its own motion, then the common council of said city shall by resolution duly adopted order and direct said railway company to extend its lines to the city limits within such time as may be specified in such resolution, and said company shall comply therewith. And said railway company shall extend its tracks over any and all such streets of said city as the common council shall at any time by ordinance direct, but shall not be obliged to so extend its tracks unless there is a reasonable necessity therefor for the convenience of public travel; and when any such extension shall be made, all and singular the provisions of this ordinance relating to the operation thereof shall apply the same as though the provisions of this ordinance were made a part of the ordinance requiring such extension. Provided, however, that said railway company shall not be compelled to extend its lines from any of its terminal points to the city limits except over and along the streets or avenues upon which such terminus is located, and in no case shall said railway company be compelled to extend its lines unless the streets or avenues over which such extension is to be made shall first have been made to the established grade."

On May 7, 1917, the mayor and common council of the city of *Milwaukee* adopted an ordinance, the material part of which is as follows:

"Section 1. Under the provisions of section 4 of an ordinance passed January 2, 1900, granting certain franchise privileges to the *Milwaukee Electric Railway & Light Company,* the common council of the city of *Milwaukee* hereby and now finds that there is a reasonable necessity for the convenience of public travel for the extension of the double-track system of the *Milwaukee Electric Railway & Light Company* west on Mitchell street from the intersection of Forest Home avenue and Mitchell street to Muskego avenue, southwesterly on Muskego avenue to Burnham street, thence west on Burnham street to Twenty-sixth avenue; wherefore the said company is now hereby directed under said provision of said ordinance of January 2, 1900, to so extend its tracks over the streets above mentioned and to complete the same on or before the first day of July, 1917."

The defendant refused to comply with the terms of the

ordinance, and the city brings this action. It appears from the return to the petition that there was instituted before the railroad commission of Wisconsin on August 21, 1917, a certain proceeding entitled Fred Plautz, etc. v. Milwaukee E. R. & L. Co.; that on October 15, 1917, there was a second similar proceeding begun before the railroad commission, which proceedings had for their purpose the securing of an order from the railroad commission directing the respondent to construct the line described in the petition. It further appears from the file that the railroad commission on January 12, 1918, denied the relief prayed for in the petitions before referred to. There were other facts alleged in the petition and in the return and in the answer to the return which are not material to the consideration of the questions presented here. From an order of the circuit court quashing the alternative writ the plaintiff appeals.

Clifton Williams, city attorney, for the appellant.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

ROSENBERRY, J. The defendant contends (1) that the order should be affirmed for the following reasons:

"(1) Various legislative acts, and particularly ch. 565, Laws 1917, which, by state-wide rule, defines the duty of street railway companies in respect to construction of extensions, have superseded, vacated, and made impossible of performance the provisions of said ordinance relating to the construction of extensions.

"(2) The state has provided a remedy before a special tribunal for the purpose of securing the construction of street railway extensions. Under such circumstances the judicial policy of the state requires that the petitioner prosecute its remedy before the special tribunal.

"(3) Even the ordinance imposes no duty to construct the extension unless public convenience and necessity require its construction. The railroad commission has determined that

public convenience and necessity does not require the construction of the extension.

"(4) The ordinance relates only to the extension of radial lines to the city limits and not to the construction of new lines."

Plaintiff contends that the order should be reversed (1) because in the 1900 franchise the clause in question is a term of said franchise so as to constitute a contract within the provisions of sec. 10, art. I, of the constitution of the United States; (2) that sec. 1863, Stats., as amended by ch. 565, Laws 1917, applies only to suburban and interurban street railways and has no application to street railways within cities; (3) that the power to designate streets upon which street railways may construct their lines is a legislative power and cannot be delegated to the railroad commission; (4) that if sec. 1863, as amended by ch. 565, Laws 1917, is held to in effect amend sec. 4 of the ordinance of January 2, 1900, it is unconstitutional because it impairs the obligation of a contract.

The main questions raised and considered on this appeal are determined by previous decisions of this court.

1. Sec. 1863, Stats., does not now apply and has not applied exclusively to interurban or suburban railroads. *Milwaukee L., H. & T. Co. v. M. N. R. Co.* 132 Wis. 313, 329, 112 N. W. 663; *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925.

2. Sec. 1863 is as follows, that part introduced by ch. 565, Laws 1917, being italicized:

"Any street railway corporation *operating within any municipality shall extend its lines and furnish service thereon whenever, after complaint made as provided in sec. 1797—4 and public hearing after notice to all parties interested, the railroad commission shall have found and declared that public convenience and necessity require such extension and such additional service and that the construction and operation of such extension will not impair the earnings of the said cor-*

poration so as to prevent an adequate or fair return, and provided that any such order shall be subject to judicial review in like manner as now provided by law with respect to other orders of the railroad commission, and such corporation may extend its railway to any point within any town adjoining the municipality from which it derived its franchise, and for such purposes may, with the written consent of a majority of the supervisors of such town, lay and operate its railway upon, across and along any highway, but not so as to obstruct common public travel thereon. Corporations may be formed and governed in like manner as is provided in section 1862 for the purpose of building, maintaining and using railways with rails of wood or iron in any city, village or town, or to extend from any point in one city, village or town to, into or through any other city, village or town, and for running cars propelled by animals or other power for the carriage of either passengers or freight; and for that purpose, with the consent of the common council of any city, the board of trustees of any village and the written consent of a majority of the supervisors of any town in, into or through which such railway or tramway may extend, may lay and operate their railways or tramways upon, across and along any highway, but not so as to obstruct the common public travel thereon. In any city or village the consent of the common council or board of trustees shall be given by ordinance, and upon such terms and subject to such rules and regulations and the payment of such license fees as the common council or board may from time to time prescribe; provided, that the common council or board shall not alter or change the license fee prescribed for any such corporation oftener than once in each five years."

Even if prior to the enactment of ch. 565, Laws 1917, sec. 1863 had applied only to suburban or interurban railways, there is nothing to indicate that street railways operating within cities are excepted from the language "within any municipality," which clearly applies to all municipalities, including cities.

3. The amendment to sec. 1863 must be construed with reference to the other provisions of the section. The power to grant a franchise for the occupation of city streets is by

sec. 1863 conferred upon the common councils of cities. Whatever the power of the legislature may be in respect to granting a franchise upon the streets of cities for the extension of street railway lines where public convenience and necessity require it, in the absence of a clearly expressed legislative intent to that effect it will not be assumed that the legislature intended to withdraw from municipalities powers so delegated to them. In accordance with settled rules of construction the provisions of the section must be construed as a whole and effect given to every part thereof. *Harrington v. Smith,* 28 Wis. 43.

We do not decide or consider, because not presented by this record, the question whether or not under the January 2, 1900, ordinance a franchise is thereby granted for the extension of the defendant's lines upon such streets as public convenience and necessity shall thereafter require within the terms therein stated. The ordinance of May 7, 1917, removes the question from this case.

4. Sec. 1863 must be construed to mean that a street railway corporation operating within a municipality is bound to construct its street railway upon such streets as the municipality in question may theretofore or thereafter have designated by the giving of a franchise or otherwise, if public convenience and necessity require such extension. If a municipality so circumstanced has not granted and refuses to grant a franchise for an extension under existing law, the street railway company cannot extend its lines, and all orders of the railroad commission for the extension of lines must be subject to the provision that a franchise, permit, or license therefor has been given or be first obtained from the proper municipality.

5. Under that part of the January 2, 1900, ordinance referred to, the city may compel the construction of lines where public convenience and necessity require it.

6. The amendment to sec. 1863 made by ch. 565, Laws 1917, provides a special tribunal which is to ascertain a fact,

that is, Does public convenience and necessity require the proposed extension? While the method of procedure is not definitely outlined, the ordinance of January 2, 1900, is in effect amended by ch. 565, Laws 1917, so as to make the procurement of the certificate of convenience and necessity from the railroad commission a condition precedent to the right of the city to compel the construction of an extension. *State ex rel. Superior v. Duluth St. R. Co.* 153 Wis. 650, 142 N. W. 184.

7. The clause of the ordinance of January 2, 1900, by its terms provides that an extension shall not be required unless public convenience and necessity demand it, and in this case we hold that the ordinance is amended no further than that the railroad commission is made the exclusive tribunal for the ascertainment of that fact.

8. The question as to whether or not the clause of the January 2, 1900, ordinance referred to is a "term" within *Superior v. Duluth St. R. Co.* 166 Wis. 487, 165 N. W. 1081, does not arise. Changing the remedy by which a right under a contract is enforced does not impair the obligation of the contract. *Borgnis v. Falk Co.* 147 Wis. 327, 366, 133 N. W. 209. There is a wide distinction between the power of a municipality to regulate a utility under a delegated power and the authority of the state in the same field. *Milwaukee E. R. & L. Co. v. Railroad Comm.* 153 Wis. 592, 142 N. W. 491.

By the Court.—Order affirmed.

CITIZENS STATE BANK OF SHAWANO, Respondent, vs. CAYOUETTE, imp., Appellant.

March 6—April 29, 1919.

Bills and notes: Liability of wife as signer: Husband as her agent: Benefit to her separate estate.

1. In an action upon a promissory note executed by husband and wife, but which the wife claimed was executed by her as surety only, the evidence is *held* to sustain findings by the jury to the effect that the husband was the agent of the wife in obtaining the loan, that her separate property received the benefit of the money so obtained, that said money was necessary and convenient for the use and enjoyment of her separate estate, and that she authorized her husband to withdraw funds deposited to her credit in the plaintiff bank.
2. The use of the borrowed money to procure a liquor license so as to keep the wife's property as saloon property under the Baker law (chs. 188, 484, Laws 1907; sec. 1565*d*, Stats.) was a benefit or understood to be a benefit to her separate property.

SIEBECKER, ROSENBERRY, and OWEN, JJ., dissent.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *Kittell, Jaseph & Redfield* of Green Bay.

For the respondent there was a brief by *Dillett & Winter* of Shawano, and oral argument by *P. J. Winter.*

KERWIN, J. This is an action on a promissory note for $300 executed by Sam Cayouette and his wife *Anna Cayouette,* the appellant, as maker, and payable to respondent, *Citizens State Bank of Shawano,* and indorsed by one Paul Winter. Defendants admitted the execution of the note. *Anna Cayouette* alone answered, and set up the defense that she was a married woman and executed the note as surety only for her husband and that the proceeds of the note were for the sole benefit of her husband, and that neither she nor her estate was benefited thereby.

On the trial the jury found that Sam Cayouette was employed by his wife, *Anna Cayouette,* as her agent in securing and obtaining the loan for her from the respondent bank on June 29, 1915; that the separate property and separate estate of appellant received the benefit of the money obtained on said loan; that said money so obtained was necessary and convenient for the use and enjoyment of appellant's separate estate and property; that appellant authorized her husband, Sam Cayouette, to withdraw funds deposited to her credit in the bank by issuance of his checks. Judgment was entered for the plaintiff on the verdict, and *Anna Cayouette* appealed.

It is insisted that the verdict is contrary to the evidence. Under this head several propositions are argued which we shall briefly consider.

1. It is contended that the husband, Sam Cayouette, was not the agent of his wife in obtaining the loan. There is evidence tending to show that Sam Cayouette went into the saloon business on the property of his wife, the appellant here, and borrowed money for that purpose, and that his wife was interested in continuing the saloon business on her property. The dealings and property transactions between Sam and his wife tend strongly to show that they were acting together for the benefit of *Mrs. Cayouette's* property and that in the transactions under consideration regarding the saloon business and borrowing of the money for which the note in suit was given the defendant *Anna Cayouette* was interested and Sam, her husband, was acting for her. We are therefore convinced, upon a review of all the evidence, that in obtaining the loan for which the note in suit was given the finding of the jury to the effect that Sam was the agent of his wife in obtaining the loan is supported by the evidence.

2. It is further contended by the appellant that her separate property was not benefited by the loan. The finding of the jury against the appellant's contention on this point is also well supported by the evidence. In considering this

finding it is helpful to examine the course of conduct of Sam and his wife in their dealings regarding their property. It appears that appellant owned the saloon property and that Sam conveyed to her other property for the purpose of defrauding his creditors. Sam seems to have made the contracts, and *Anna,* or *Anna* and Sam, received the profits. The whole scheme appears to have been devised for the purpose of obtaining money when needed by Sam or *Anna.* The evidence tends to show a system of doing business by *Anna* and her husband, Sam, of borrowing money with the intention of avoiding payment, and that money borrowed by Sam and used for the appellant was a part of the scheme. We are satisfied that the finding to the effect that the separate property and estate of the wife received benefit from the money obtained on the loan is supported by the evidence. *Bouck v. Enos,* 61 Wis. 660, 21 N. W. 825; *Holway v. Sanborn,* 145 Wis. 151, 130 N. W. 95; *Barlow v. Foster,* 149 Wis. 613, 136 N. W. 822; *Somers v. Germania Nat. Bank,* 152 Wis. 210, 138 N. W. 713.

3. It is further argued that the money obtained on the loan for which the note in suit was given was not convenient or necessary for the use and enjoyment of the wife's separate property. The jury found that it was, and we think the finding is supported by the evidence. *Kriz v. Peege,* 119 Wis. 105, 95 N. W. 108. The obtaining of the license so as to keep the property as saloon property under the Baker law [Laws 1907, chs. 188, 484; sec. 1565*d*, Stats.] was a benefit or understood to be a benefit to the separate estate and property of the appellant under the finding of the jury supported by the evidence. *State ex rel. Marvin v. Larson,* 153 Wis. 488, 140 N. W. 285; *Zodrow v. State,* 154 Wis. 551, 143 N. W. 693.

4. The jury also found that the appellant authorized her husband, Sam Cayouette, to withdraw funds deposited to her credit in the respondent bank. The husband and wife

living together as shown in this case, in connection with their dealings in all property matters, together with other evidence, convince us that the jury was entitled to find that the husband was authorized to withdraw funds deposited in the plaintiff bank to the credit of appellant.

5. It is also contended by respondent that the appellant, *Anna Cayouette,* is estopped from denying liability. There is considerable evidence supporting the respondent's contention upon this point, but the findings of the jury being supported by the evidence we do not deem it necessary to pass upon this point. *H. W. Wright L. Co. v. McCord,* 145 Wis. 93, 128 N. W. 873; *S. D. Seavey Co. v. Campbell,* 115 Wis. 603, 91 N. W. 655; *Somers v. Germania Nat. Bank,* 152 Wis. 210, 138 N. W. 713.

6. It is further argued that no action at law can be maintained against a wife upon a note executed by her as surety only. Since the findings are supported by the evidence this contention is without merit.

7. It is also insisted that there was error in the admission of evidence. We shall not extend this opinion by a discussion of this point. It is sufficient to say that we find no prejudicial error under this head.

By the Court.—The judgment is affirmed.

SIEBECKER, J. (*dissenting*). I cannot concur in the affirmance of the judgment of the circuit court. The law governing the case is clearly stated in the head-note to *Bailey v. Fink,* 129 Wis. 373, 109 N. W. 86:

"A married woman cannot be charged in an action at law upon a note signed by her with her husband as surety for his debt, where her act in becoming a party to the note was not necessary or convenient to the use and enjoyment of her separate property or to the carrying on of her separate business, and did not relate to her personal services. The facts that the payee changed his position (as by releasing a mortgage on the husband's chattels) on the faith of the wife's

signing the note, and that the note specifically stated that she charged her separate estate with the payment thereof, are not available as grounds of liability at law."

See, also, *Merrell v. Purdy,* 129 Wis. 331, 109 N. W. 82.

I have read the evidence and find none whatever which in any sense tends to show that the defendant *Anna Cayouette* in any manner, directly or indirectly, made Sam Cayouette, her husband, her agent to borrow money or to attend to her business. I think the finding of the jury on this question is wholly unsupported by evidence. It is undisputed that Sam, the husband, obtained the license to conduct the saloon for himself, and that neither he nor Mr. Winter had any conversation or dealing with *Anna Cayouette* about borrowing this money from the bank. The evidence affirmatively shows that she knew nothing of the fact that her husband borrowed money from the bank in June, and it appears that she knew nothing about it until the following October, after Sam had used it for his individual saloon business and Winter was pressing him to have her sign the note. Mr. Winter testifies he had no communication with her on the subject. The representatives of the bank do not claim that they had any dealings with *Anna Cayouette* or that she was to sign the note and charge her separate estate with it, and the evidence is affirmative to the effect that she was not solicited to sign the note until October, after the loan was made to Sam Cayouette in June. No witness was adduced who testified to any transaction tending to show that the husband was employed by the wife as agent or that she authorized him to obtain and use the money for the benefit of her estate. The trial court and jury evidently thought that under the circumstances the money obtained from the bank was necessarily used by the husband in his saloon business and that this use operated for the benefit of the wife's separate estate, and that under such circumstances she could be held on her subsequent promise to sign as surety. But this is untenable, for the reason that she cannot be held responsible for any finan-

cial obligation her husband incurred in conducting his separate saloon business, although he used her building. Such use of her property by him is in no legal sense for the benefit of her separate estate. But it is claimed that the separate property of the wife received the benefit of the money her husband borrowed, because the facts and circumstances show that the husband represented her in securing a license in his name for the business to be conducted in her separate property, and thus to preserve the right to have this property devoted to the liquor business. There is, however, no evidence showing that the money in fact in any way benefited her estate, and the affirmative evidence is to the effect that she did not desire to have her husband conduct a saloon business, that she received no rent from him for the premises, that she did not know that her husband had borrowed money for the business until four months after he started the business for himself, at which time she first learned of this loan because he was threatened with having his license revoked and his business ruined and the liquor business discontinued in her building. Even then there is nothing to show that she desired to have the saloon business continued in her building in order to preserve the right to have it used for such a business. How the jury spelled out that the loan from the bank benefited her separate estate under these facts and circumstances is not perceived. The reasonable and the only permissible inferences of all the facts and circumstances of the case sustain and conclusively demonstrate to my mind that the husband obtained the loan without his wife's knowledge for his personal use and that the wife's separate estate was not benefited by the loan, and that it plainly appears that the bank and the guarantor, upon discovering, four months after the loan was made, that the husband was in failing financial circumstances, prevailed upon him to have his wife, who up to this time was ignorant of the loan, sign his note as surety and that she did so when her act did not benefit her separate property or business and she did not agree nor intend to

charge her separate estate. In my opinion the verdict is not supported by the evidence and the judgment should be reversed.

ROSENBERRY and OWEN, JJ. We concur in the foregoing opinion of Mr. Justice SIEBECKER.

STATE EX REL. BLAINE, Attorney General, vs. WISCONSIN TELEPHONE COMPANY.

March 8—April 29, 1919.

Federal control of telegraphs and telephones: Congressional resolution: "Possession:" "Control:" "Operation:" "Police regulation:" Suits against United States officers and agents: Use of property: Torts: Personal liability: Injunction: Suits against United States: Consent: Constitutional law: Police power.

1. The term "police power," in its limited sense, includes simply regulations for the protection of the lives, health, and property of citizens and the promotion of good order and good morals.
2. A Congressional resolution authorizing the President "to supervise or to take possession and assume control of" and "operate" any telegraph or telephone system for the duration of the war, and providing that the resolution should not be construed to affect the police regulations of the state, is *held* to authorize the fixing of intrastate rates, the words "possession," "control," and "operation" importing absolute power over the subject without interference, and "police regulations" referring merely to regulations to insure the lives, health, and welfare of the public and the employees.
3. Where the United States by its officers is rightfully in possession of property and is using it in governmental operations, such use is not to be interfered with by injunctions or other writs issued out of state courts in actions brought against such officers.
4. The sovereign cannot be sued except with its own consent and in courts of its own choice.
5. United States officers or agents may be held personally liable in actions of tort to private persons whose rights of person or property have been wrongfully invaded or injured while acting under the authority of the United States.

6. United States officers or agents may be enjoined from carrying out a threat to wrongfully invade or injure rights of property of private persons while acting under the authority of the United States.

ESCHWEILER and OWEN, JJ., dissent.

THIS IS an action by the state, brought originally in this court on relation of the attorney general, to permanently enjoin the defendant company from charging higher rates for intrastate messages than the rates fixed by the railroad commission of the state on September 1, 1907. The company, which controls eighty per cent. of the long-distance telephone business in the state, answered alleging that on July 31, 1918, the President of the United States took full control and possession of its lines, pursuant to a joint resolution of Congress authorizing such action in the exercise of the war power, and that the increased rates in question were fixed by the postmaster general, acting for the President, January 21, 1919, and that in operating its telephone lines it was simply acting as the agent of the United States and was not operating the same as a public utility.

Both parties moved for judgment on the pleadings, from which it appears, among other things, that by joint resolution of Congress passed July 16, 1918, the President was authorized during the continuance of the war, whenever he deemed it necessary for the national security or defense, "to supervise or to take possession and assume control" of any telegraph or telephone system or any part thereof and "to operate the same in such manner as may be needful or desirable" for the duration of the war, but not beyond the date of the President's proclamation announcing the ratification of the treaty of peace, just compensation being required for such use; the resolution also providing that nothing therein should be construed "to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states except wherein such laws, powers, or regulations may affect the

transmission of government communications or the issue of stocks and bonds by such system or systems."

It further appears from the pleadings that the President, by proclamation on July 22, 1918, announced that he thereby took possession and assumed control and supervision of each and every telegraph and telephone system in the United States with all equipment, material, and supplies, and that the "supervision, possession, control, and operation" of such system should be exercised by and through the postmaster general, who was authorized to perform his duties through the owners, managers, officers, and employees of the system so long and to such extent and manner as he should determine. Possession was actually taken July 31, 1918, and the defendant's system has since that time been operated by its officers and employees as the agents of the government. A general raise in the rates of all messages was made January 21, 1919, by direction of the postmaster general, and this action is brought to enjoin the company from charging such increased rates or any rates in excess of the rates fixed by the railroad commission September 1, 1907.

John J. Blaine, attorney general, and *M. B. Olbrich,* deputy attorney general, for the relator.

For the defendant there was a brief by *Miller, Mack & Fairchild* of Milwaukee, attorneys, and *Eugene S. Wilson* of Chicago, of counsel, and oral argument by *Edwin S. Mack.*

A brief on special appearance for the United States was filed by *H. W. Sawyer* of Milwaukee and *A. C. Wolfe* of La Crosse, United States district attorneys, and *B. R. Goggins* of Grand Rapids, special assistant to the United States attorney general; and the cause was argued orally by *Mr. Sawyer, Mr. Wolfe,* and *Mr. Goggins.*

WINSLOW, C. J. A number of very important and interesting questions were debated in the present case with ability and force. We shall not attempt to discuss them all in this

opinion. Most if not all of them will doubtless be presented to the supreme court of the United States in the near future and will there receive comprehensive treatment, and, as that court speaks the final word on all such subjects, it seems that it would be a work of supererogation for this court to write at length upon them now. We feel, however, that when so much labor and ability have been expended in the preparation and argument of a case involving such serious questions, it is only fair that the bench should with promptness respond to the effort made by counsel and meet the issue fairly and squarely instead of evading it. This course seems not only to be the dignified course, but the course demanded by the public interest, and we have concluded, therefore, to briefly state our conclusions on several propositions which seem to us controlling in this case.

There is no question as to the authority of the United States, by virtue of its exclusive war power, to take over and operate the telegraph and telephone lines of the country in time of war.

Without seriously questioning this proposition, the state contends that the power to prescribe rates is a police power and, being such, is specifically reserved to the states by the proviso at the close of the joint resolution of Congress which specifically says that the laws and powers of the states in relation to taxation or lawful police regulations are not amended, repealed, impaired, or affected.

The term "police power" is very elastic and is used to express different meanings at different times. In its broadest sense it has been said to include "all legislation and almost every function of civil government." *Sligh v. Kirkwood,* 237 U. S. 52, 59, 35 Sup. Ct. 501. In its limited sense and as more frequently used, it includes simply regulations "for the protection of the lives, health, and property of citizens and the promotion of good order and good morals." *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118. It is police power in this limited sense which the federal su-

preme court grants to the states in cases where its exercise affects interstate commerce. Freund, Police Power, § 10. It is in this limited sense, also, that the term is used when it is said in our own decisions and in the decisions of the United States courts that the police power of the state cannot be bargained away either by the legislature or by municipal corporations. *Superior v. Roemer,* 154 Wis. 345, 141 N. W. 250; *Stone v. Mississippi,* 101 U. S. 814; *Northern Pac. R. Co. v. State ex rel. Duluth,* 208 U. S. 583, 28 Sup. Ct. 341.

This must be so from the fact that the courts hold that a city may lawfully make a contract which is binding on itself governing rates to be charged by a public utility for its service. *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925; *Detroit v. Detroit C. St. R. Co.* 184 U. S. 368, 22 Sup. Ct. 410. It could not do so if the rate-making power were a police power within the meaning of that term as used in the cases first above cited.

The question here is whether the term is used in its broadest sense or in its limited and perhaps ordinary sense in the Congressional resolution. Looking at the purposes to be accomplished and the context, we think it is clear that the term was used in its limited sense. "To take possession . . . assume control . . . and to operate" are broad and sweeping terms. Possession, control, and operation naturally import absolute power over the subject without interference from others. Control without the power to fix rates is not real control. Unquestionably the government could exclude every private user if such course were deemed necessary for war purposes. If it could exclude all private users it would seem to follow that it may determine on what terms private persons may be allowed to use the lines. *Pro hac vice* the telephone lines belong to the government and are part of the enginery with which the war is to be won. It seems unthinkable that the government should deliberately surrender to state agencies in forty-eight states and to municipal agen-

cies in many cities the power to prescribe on what terms private persons might use government property. We acquit Congress of this absurd intention. The police regulations referred to in the proviso are undoubtedly such regulations intended to insure the lives, health, moral and physical welfare and good order of the public and of the employees as the state may see fit to prescribe.

There are other considerations which seem to us equally conclusive against the maintenance of this action by the state.

The principle has been very definitely settled by the federal supreme court that when the United States by its officers is rightfully in possession of property and is using the same in governmental operations, such use is not to be interfered with by injunctions or other writs issued out of state courts in actions brought against such officers or agents. The reason is that such actions are, in effect, actions brought against the sovereign, and the sovereign cannot be sued except with its own consent and in courts of its own choice. *Belknap v. Schild,* 161 U. S. 10, 16 Sup. Ct. 443; *International P. S. Co. v. Bruce,* 194 U. S. 601, 24 Sup. Ct. 820; *Wells v. Roper,* 246 U. S. 335, 38 Sup. Ct. 317.

If such actions were to be maintained and injunctive relief granted, the result would be either that the sovereign would be practically coerced in an action to which it was not a party, or that the sovereign would disregard the *brutum fulmen* of the trial court and render the decree nugatory and ridiculous. In the present case, if the injunction were to be granted, all that the government would have to do would be to place another set of servants in possession of the telephone system and proceed to operate it as before. The right of the government is not to be interfered with behind its back. *International P. S. Co. v. Bruce, supra.* This does not mean that United States officers or agents may not be held personally liable in actions of tort to private persons whose rights of person or property they have wrongfully invaded

or injured while acting under the authority of the United States. *Belknap v. Schild, supra.* Nor does it mean immunity from injunctive process on the part of such officer in case of threatened injury to property rights. *Philadelphia Co. v. Stimson,* 223 U. S. 605, 32 Sup. Ct. 340.

The principles stated are decisive of the present case. If they are necessary in time of peace they are tenfold more so in time of war. The plight of a government which must submit the control of any essential branch of its war activities to another government is serious indeed. It cannot expect to escape disaster, for successful war means practically absolutism for the time being.

We have received since the argument of the case the recently rendered opinions of four courts of last resort in dealing with similar cases, viz.: *Railroad Comm. v. Cumberland, etc. Co.* (La.) 82 South. ——; *Southwestern, etc. Co. v. Oklahoma* (Okla.) 181 Pac. 487; *Public Service Comm. v. New England T. & T. Co.* (Mass.) 122 N. E. 567; *State v. Burleson* (Ala.) 82 South. ——; and *State ex rel. Payne v. Dakota Cent. Tel. Co.* (S. Dak.) 171 N. W. 277. Of these decisions the first four support the conclusion reached in this opinion, while the last is to the contrary. We have been furnished with opinions of several *nisi prius* courts, state and federal, the majority of which support the view here taken. We are satisfied that the injunction should be denied.

By the Court.—Complaint dismissed, without costs.

ESCHWEILER, J. (*dissenting*). The defendant in this case is a Wisconsin corporation owing its existence and right to do business within this state to its charter obtained from this state. The rates heretofore published for service between points within the state of Wisconsin having been so fixed and established by the railroad commission, have the force, not only of contractual obligations between the defendant and its Wisconsin patrons, but of statutory obligations. *Pennsylvania R. Co. v. International C. M. Co.* 230

U. S. 184, 197, 33 Sup. Ct. 893; *New York, N. H. & H. R. Co. v. York & Whitney Co.* 215 Mass. 36, 40, 102 N. E. 366.

The defendant asserts here that it is changing such established rates by virtue of an order given to it so to do by the postmaster general of the United States. If there is sufficient authority in such official to issue such a command it is a perfect defense for the defendant and ends the matter. If there is no such power in that officer there is no valid defense asserted, and this court, having jurisdiction over a corporation created by and existing under the laws of the state of Wisconsin, has power and authority to determine and declare such absence of a valid defense. This court does not thereby assume control or jurisdiction over any branch of the federal government or officer thereof or in any manner show any want of proper respect to the federal government.

The making or changing of such rates is primarily a legislative function. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 161, 116 N. W. 905; *Milwaukee E. R. & L. Co: v. Railroad Comm.* 238 U. S. 174, 180, 35 Sup. Ct. 820; *Louisville & N. R. Co. v. Garrett,* 231 U. S. 298, 307, 34 Sup. Ct. 48.

There is no express delegation by the joint resolution here involved of such legislative function. If it is to be implied it should be clear and beyond reasonable question. *Cochnower v. U. S.* 248 U. S. 405, 407, 39 Sup. Ct. 137.

I can see, therefore, no ground upon which it could be safely asserted that Congress intended by this joint resolution to place the rate-making power as to telephone service, either interstate or intrastate, in the control of the President or in any one whom he might choose to appoint.

The proviso in the joint resolution reads:

"That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the state in relation to taxation or *the lawful police regulations* of the several states, except wherein such laws, powers, or regulations may affect the transmission of government communica-

tions, or the issue of stocks and bonds by such system or systems."

It is held by the majority opinion that the change in rates made by the order of the postmaster general of January 21, 1919, is not within the term "lawful police regulations" of the proviso.

On January 7, 1919, in the case of *Union D. G. Co. v. Georgia P. S. Corp.* 248 U. S. 372 (39 Sup. Ct. 117), the United States supreme court said as follows (p. 374):

"Capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies *rate regulation* by a state in the exercise of its *police powers.*"

There can be no valid distinction between the fixing of telephone rates and those for electric lighting.

I think such a definition of police power by the federal tribunal should be conclusive on us here when construing the term in the proviso in question, and that we should indulge in the assumption that when the legislative branch of the federal government used the same phrase in the joint resolution they meant the same thing.

The change cannot be justified as an exercise of police power. Police power belongs to the states. It has never been surrendered to the federal government, and that government as such has no police power. *Keller v. U. S.* 213 U. S. 138, 145, 149, 29 Sup. Ct. 470; *House v. Mayes,* 219 U. S. 270, 282, 31 Sup. Ct. 234; *Hammer v. Dagenhart,* 247 U. S. 274, 275, 38 Sup. Ct. 529; *U. S. v. Doremus,* 249 U. S. 86, 39 Sup. Ct. 214.

I cannot see that the defendant has met the burden of showing proper authority for the postmaster general to make the order of which complaint is made. The determination of some particular officer that he has the power he asserts is not controlling.

"Neither the silence of Congress nor decisions of officers of the United States have any authority beyond the domain

established by the constitution." *Weigle v. Curtice Bros. Co.* 249 U. S. 285, 39 Sup. Ct. 124.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *U. S. v. Lee,* 106 U. S. 196, 220, 1 Sup. Ct. 240.

The right of possession by the postmaster general of the telephone system is no more disturbed by requiring the defendant company to continue its law-fixed rates than was his possession interfered with when the system was conducted under the old rates before the order of January 21st, or than it is, because he cannot set aside the state laws as to taxation. It may affect the revenue, but this is not a revenue measure. The application here does not seek to take away anything now in the possession of the federal government as in the cases cited in the majority opinion, *Belknap v. Schild,* 161 U. S. 10, 16 Sup. Ct. 443; *International P. S. Co. v. Bruce,* 194 U. S. 601, 24 Sup. Ct. 820, or the breaking of a contract as in *Wells v. Roper,* 246 U. S. 335, 38 Sup. Ct. 317. It challenges the authority asserted by an official who, if within his authority, may be immune from judicial control, but if he attempts to act without his lawful jurisdiction is as amenable to the courts as is the humblest citizen. *Philadelphia Co. v. Stimson,* 223 U. S. 605, 620, 32 Sup. Ct. 340; *Waite v. Macy,* 246 U. S. 606, 610, 38 Sup. Ct. 395; *Gegiow v. Uhl,* 239 U. S. 3, 9, 36 Sup. Ct. 2; *Lane v. Watts,* 234 U. S. 525, 540, 34 Sup. Ct. 965; *Degge v. Hitchcock,* 229 U. S. 162, 33 Sup. Ct. 639; *School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, 110, 23 Sup. Ct. 33; *Noble v. Union River L. R. Co.* 147 U. S. 165, 172, 13 Sup. Ct. 271.

I think the prayer of the petition should be granted.

I am authorized to state that Mr. Justice OWEN agrees with me in this dissent.

STATE EX REL. PORTAGE COUNTY DRAINAGE DISTRICT, Respondent, vs. NEWBY, County Treasurer, imp., Appellant.

April 2—April 29, 1919.

Drains: Delinquent assessments: Statutes construed: Penalties belong to district: Remedies: Mandamus to county treasurer: Claim against county: Limitation of actions: Waiver: Delay in mandamus action.

1. Under sub. 5, sec. 1379—25, Stats., the provisions of secs. 1090, 1112, and 1129 relating to penalties in the case of delinquent general taxes apply to the collection of drainage assessments.
2. The word "principal" in sub. (b) and sub. (c) of sec. 1379—25*a*, Stats., relating to drainage district accounts, includes, in addition to the amounts of the delinquent drainage assessments, the penalties of two and twelve per cent., above referred to, imposed by secs. 1090, 1112, and 1129; the word "face" in sub. (d) of sec. 1379—25*a* has the same meaning; and the word "interest" in said sub. (d) means the interest on the certificates from the date of the sale to the county up to the date of the deed.
3. The penalties so added by law to delinquent drainage assessments belong to the drainage district, and not to the county. The county, in all its transactions relating to the collection of such assessments, acts in a trust capacity only for the benefit of the drainage district.
4. Where the county treasurer has collected the penalties upon delinquent drainage assessments and still has the moneys in his possession, the proper remedy is by *mandamus* to compel him to turn such moneys over to their owner, the drainage district. Under such circumstances the district has no remedy against the county itself, and disallowance of a claim filed against the county for the moneys in the treasurer's hands is of no consequence.
5. Whether the statute of limitations applies to actions of *mandamus* is not decided. *It seems* that long and unreasonable delay in commencing the action will be ground for refusing relief, especially where such delay has been prejudicial to respondent's rights; but whether there has been such delay must depend on the facts of the particular case.
6. The objection that an action is barred by the statute of limitations is waived if not taken by demurrer or answer.

APPEAL from an order of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Affirmed.*

This is an action of *mandamus* brought by the trustees of a drainage district to compel the county treasurer of Portage county to turn over to the drainage district board the penalties upon delinquent drainage assessments which have been retained by the county treasurers of Portage county during the years 1910 to 1917, inclusive. The action was originally brought against one Hebard, who was county treasurer from 1910 to 1914, as well as against the present treasurer, *Newby,* and the county was also made a party. All the defendants joined in the motion to quash and the alternative writ was dismissed as to the defendants Hebard and Portage county, but as to the appellant, *Newby,* the motion was denied, and from that denial *Newby* appeals. The petition states that the moneys are still in the county treasury.

For the appellant there was a brief by *J. R. Pfiffner,* district attorney, and by the *Attorney General* and *E. E. Brossard,* assistant attorney general, of counsel, and a reply brief signed by *Mr. Pfiffner;* and the cause was argued orally by *Mr. Pfiffner* and *Mr. Brossard.*

For the respondent there was a brief by *Nelson & Hanna* of Stevens Point, attorneys, and *B. M. Vaughn* of Grand Rapids, of counsel, and oral argument by *T. H. Hanna.*

WINSLOW, C. J. The basic question presented in the case is whether the penalties which are added by law to drainage assessments when they are allowed to remain unpaid and go to tax sale belong to the county or to the drainage district. The trial judge held that they belonged to the drainage district, and we think his conclusion correct.

The statutory provisions governing the formation and management of drainage districts are of considerable length and it would hardly be useful to attempt to set them forth in detail; they will be found in the Statutes, beginning with sec. 1379—11 and running to and including sec. 1379—40. The general plan is not complicated. On application of a majority of the adult owners representing at least one third in

area of the wet lands in any swampy district, the circuit court after due notice and hearing may, if the public health and welfare will be promoted thereby and the benefits will exceed the damages and cost of construction, create the proposed drainage district and appoint three commissioners therefor, the district thus becoming a *quasi*-municipal corporation with the right to sue and be sued and to borrow money with the approval of the court necessary to carry out the powers granted to the commissioners. The commissioners thereupon employ an engineer to lay out the drainage system, make assessments of benefits and damages, and report them fully to the court, which after due notice and trial may modify the same either as to benefits or damages to any parcel and confirm the report as modified, and may also order the assessments to be paid in instalments not more than fifteen in number. The assessments of benefits become liens on the parcels of lands on which they are respectively assessed and may be paid into court at once if the landowner chooses, but if not then they are to be paid to the commissioners at a time and place fixed by the commissioners, of which notice is given. If they are not so paid the delinquent parcels are certified to the town, city, or village clerk, who enters the unpaid assessments with the interest due on the tax roll in a separate column, and collection thereof is made in the same manner as in the case of general taxes, with certain immaterial exceptions. All such assessments collected by the local treasurer on or before the last Tuesday in March are to be transmitted to the drainage commissioners and all remaining unpaid are to be returned to the county treasurer, who is required to advertise and sell the lands assessed in the same manner as he does for unpaid general taxes, keeping them separate, however, and issuing a separate certificate in each case. A deed issues on the certificate of sale as in case of an unpaid general tax. When no private bidder appears the county treasurer bids off the land in trust and thereafter

holds or assigns the certificate "in trust for such drainage district," but the county does not have to pay the district any money thereon until it takes a deed of the land. The rules of law applying to the collection of general taxes and tax sales, unless in conflict with the drainage act, apply to the assessments, except that the assessment certificates draw ten per cent. interest. Sub. 5, sec. 1379—25, Stats.

Turning now to the statutes governing delinquent general taxes, we find that under sec. 1090, Stats., taxes not paid before the last day fixed by law for payment without penalty are subject to a penalty of two per cent., which the local treasurer is required to collect; also that, under sec. 1112, Stats., if the tax remains unpaid, this two per cent. is included with the tax in the statement of unpaid taxes returned by the local treasurer to the county treasurer; also that, under sec. 1129, after the return is made to the county treasurer any person wishing to discharge a delinquent tax so returned must pay, in addition to the two per cent. before mentioned, an additional penalty in the shape of interest at twelve per cent. per annum from the first day of January previous.

There is nothing in the drainage act in conflict with these provisions, hence they apply to the collection of drainage assessments. These penalties have been regularly collected by the county treasurer and they make up the amount in dispute in this action. They are added to and become a part of the assessment by virtue of the statutory provisions referred to.

Returning to the drainage act, we find that by sec. 1379—25*a* the county treasurer is required to keep a separate account with the drainage district, in which he credits the district with (a) all sums received in payment of drainage assessments, (b) all sums received in payment as principal on sale of drainage certificates at the tax sale (except where the sale is to the county), (c) all sums received for principal and interest on sale or assignment of such certificates after

they are bid in by the county, (d) the face and accrued interest on all certificates up to the date of the deed, where the county takes a deed to itself, (e) any and all other sums received by the county on account of the district.

With regard to these provisions the trial judge very tersely and correctly says in his opinion: "The word 'face,' used in sub. (d), is identical in meaning with the word 'principal' used in sub. (b) and sub. (c), and the 'interest' mentioned in sub. (d) is the interest from the date of the sale to the county up to the date of the deed."

It seems to us so clear that the word "principal" covers the two per cent. and twelve per cent. penalties in suit as well as the amount of the assessment itself that we do not regard discussion of the proposition as in any respect useful. When the land is sold for the assessment and the penalties, that gross sum is manifestly the principal of the certificate, and from that time interest begins to run. It follows that the sums here in dispute originally belonged to the drainage district and not to the county. This result is in entire harmony with those sections of the drainage act above referred to, which provide in substance that in all its transactions relating to the collection of drainage assessments the county acts in a trust capacity only for the benefit of the drainage district. It is also in accord with the cases in this court which hold that where, under the ordinary provisions of law, the machinery of taxation is used to collect assessments for street improvements, neither city nor county is acting for itself or in its own interest, but simply in the interest of the contractor or his assignee as a collecting agent or trustee. *State ex rel. Donnelly v. Hobe,* 106 Wis. 411, 82 N. W. 336; *State ex rel. Bank of Commerce v. Bell,* 111 Wis. 601, 87 N. W. 478.

The appellant contends that, because the statutes provide that the penalties above referred to accruing in the course of the collection of general taxes shall be collected by the county for its own use (secs. 1114, 1135, and 1144, Stats.), the pen-

alties upon delinquent drainage assessments must go in the same way. This contention, however, is completely answered if we are correct in our holding that the word "principal" as used in sec. 1379—25*a*, above referred to, includes the penalties, for, if it does, then the general provisions referred to are in conflict with the drainage law.

It is claimed (1) that *mandamus* is not the proper remedy, (2) that the action is barred because it appears by stipulation that in November, 1916, the petitioners filed a claim against the county for these sums which was disallowed by the board and no appeal taken from such disallowance, and (3) that the action is barred by the statute of limitations.

Mandamus is the proper remedy to compel a public officer to perform a duty arising out of his office which is presently due to be performed, and where other remedies, if any, are inadequate. *State ex rel. Bautz v. Harper,* 166 Wis. 303, 165 N. W. 281.

If, as alleged in the petition and alternative writ and admitted by the motion to quash, the county treasurer still has these moneys in his possession, there is no remedy against the county therefor. *State v. Milwaukee,* 145 Wis. 131, 129 N. W. 1101. The only adequate remedy is by *mandamus* to compel the treasurer to perform his statutory duty, namely, to turn the funds over to their owner, the drainage district, as required by sub. 2, sec. 1379—25*a*, *supra.* It follows necessarily that upon the facts as stated in the petition the disallowance of the claim filed against the county is of no moment, because the district had no claim against the county unless the county had used the money for its corporate purposes. *State v. Milwaukee, supra.*

The question whether the statute of limitations applies to actions of *mandamus* is one on which there is much conflict in the decisions. Merrill, Mandamus, § 314; 18 Ruling Case Law, p. 334, § 285; *State ex rel. G. B. & M. R. Co. v. Jennings,* 48 Wis. 549, 4 N. W. 641. But the question is

not before us, because the objection has not been taken by demurrer or answer, and if not so taken is waived. Secs. 2649, 2653, 2654, Stats.

It seems that long and unreasonable delay in commencing the action will be ground for refusing relief, especially where such delay has been prejudicial to the respondent's right. 18 Ruling Case Law, p. 335, § 286. But this question must depend on the facts of the particular case, and we do not feel that we ought to hold the delay unreasonable as a matter of law. It may be that it will appear when the return is made and evidence taken that the delay was entirely excusable.

By the Court.—Order affirmed.

HAKES, Respondent, vs. TOWN OF PINE GROVE, Appellant.

April 2—April 29, 1919.

Highways: Injuries from defects: Contributory negligence: Questions for jury: Special verdict.

1. One knowing the defective condition of a highway may nevertheless use it, even after dark, without being guilty of contributory negligence as a matter of law.
2. The evidence in this case—showing or tending to show, among other things, that while plaintiff was driving at dusk upon a highway which was defective by reason of stumps and roots therein, unevenness of the ground, and the zigzag course of the traveled track and its proximity to a fence, his wagon struck a stump and he was thrown to the ground and injured; that he was at the time standing on one side of a hayrack, over the front wheel, so as to be able better to see the course of the track and the stumps and obstructions; and that the horses were walking slowly—is *held* not to show contributory negligence as a matter of law. *Nicks v. Marshall*, 24 Wis. 139, and *Raymond v. Sauk Co.* 167 Wis. 125, distinguished.
3. Even if there was another traveled track within the limits of the highway it was not contributory negligence as a matter of law for plaintiff to use the regularly traveled track at the place of the accident; and it was not prejudicial error to refuse to submit in the special verdict questions as to whether the town

had provided another and reasonably safe track for public travel within the limits of the highway, especially as the great weight of evidence showed that there was no such track and, under the charge of the court, the jury so found, in effect, in answering another question.

APPEAL from a judgment of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Affirmed.*

This action was brought to recover for personal injuries sustained by plaintiff on October 21, 1916, while traveling on a public highway in defendant town.

The complaint alleged a defective highway on account of stumps and roots of trees in the traveled track such as to render the highway defective. Defendant denied liability. The court answered the first and second questions of the special verdict "Yes," which found that plaintiff was injured and that the highway was insufficient for public travel.

The other questions in the special verdict the jury found as follows: (3) insufficient condition of the highway was the proximate cause of the injury; (4) that the officers of defendant town did not employ plaintiff to blast stumps out of the highway at the point in question; (5) that plaintiff's hired man did not plow up the traveled track which extended north and south directly east of the place where the plaintiff was injured and within the three-rod limit of the highway; (6) that there was no want of ordinary care on the part of the plaintiff which proximately contributed to his injury; (7) that the damage sustained was $5,000.

A motion for a nonsuit and several other motions were made by defendant and overruled and judgment entered for plaintiff on the verdict, from which this appeal was taken.

For the appellant there was a brief by *Fisher & Cashin* of Stevens Point, and oral argument by *W. E. Fisher.*

For the respondent there was a brief by *Walter D. Corrigan* of Milwaukee and *Buchanan Johnson* of Plainfield, and oral argument by *Mr. Corrigan.*

KERWIN, J. The appellant contends that a nonsuit should have been granted on the ground that the evidence showed the plaintiff guilty of contributory negligence as a matter of law. This contention is based upon the idea that the plaintiff was familiar with the highway at the point of accident and placed himself in a dangerous position upon the wagon and drove in a careless manner, causing the injury complained of.

The defects in the highway consisted of stumps, roots of trees, unevenness of the ground, and the crooked, zigzag course of the traveled track and close proximity of the traveled track to the highway fence. The stump which caused the accident was about twelve inches high and stood within about four inches of the wheel track made by wagons driven over the highway. The plaintiff at the time of the accident was driving a team hitched to a lumber wagon with a hayrack on and was standing on the left side of the hayrack over the front wheel and bracing himself by holding on to the lines. The evidence tends to show that plaintiff took his position standing on the hayrack so as to be able to see the course of the track and stumps and obstructions in the highway and better avoid contact with obstructions and more safely drive along the traveled track. The evidence further tends to show that on account of the obstructions and crooked and zigzag condition of the traveled track it required great care to safely drive along it without coming in contact with the stumps, and that plaintiff stood upon the hayrack so as to be able to better guide his team than he could if standing on the board in the middle or bed of the wagon or sitting down. The plaintiff had driven to see a farmer named Young on a business matter and was returning home at about dusk.

The plaintiff testified:

"It is an awful stumpy place there, and the road, the main traveled track, all the track there was, went close to the fence, and I had to drive careful in order to get through; to note the stumps and situation of the road and how it was. The traveled track run on the west side of the road. I got through

all right going to Mr. Young's. I noticed that it was close to get through, but I went through. My wheels struck roots going over to Mr. Young's; you couldn't drive no other way but what they would, because the roots slanted, from the stump; slanted just like that (witness indicates); lay along. There were four stumps right there—three that was right there close, right close to the track."

The plaintiff also testified that at the time of the injury it was not "completely dark," but that he could not see dark objects next to the ground very easily.

"I was standing braced with my feet. When I got where those stumps were that I have told you about and where I was finally hurt I was walking the team. When I got to that place I was driving south, right close up to the stumps; and I was guarding to get through as near as possible as I could to get through right, and struck the stump, and it throwed me instantly. That was the last thing I knew till I came to."

The evidence tends to show that plaintiff knew of the defect in the highway and made an effort to pass over it carefully, thoughtfully, and prudently with intent to avoid the danger; that he drove the way he always did under such circumstances; that he brought the horses to a slow walk and was using all the care he could to avoid the accident.

As observed by the trial judge in the court below, most of the persons on the jury were farmers and were entitled to use their knowledge as to whether the plaintiff was guilty of negligence in taking the position he did in standing upon the hayrack. One knowing the defective condition of a highway may nevertheless use it, even after dark, without being guilty of contributory negligence as matter of law. *Hart v. Red Cedar,* 63 Wis. 634, 24 N. W. 410; *Petrich v. Union,* 117 Wis. 46, 93 N. W. 819; *Luedke v. Mukwa,* 90 Wis. 57, 62 N. W. 931; *Coppins v. Jefferson,* 126 Wis. 578, 105 N. W. 1078.

The learned trial judge rendered an opinion which is in the record, and held that the evidence did not show that

plaintiff was guilty of contributory negligence as matter of law. We cannot say that the court below was wrong in denying the motion for a nonsuit or refusing to change the answers of the jury in the special verdict.

It is argued that a new trial should have been granted because the court refused to submit to the jury as part of the special verdict the following questions:

"Did the defendant provide a track for public travel within the limits of the highway east of the point where the accident in question happened?

"If you answer the last question 'Yes,' then answer this question: Was such traveled track reasonably safe for public use?"

There was no prejudicial error in refusing to submit these questions. Even if there was another traveled track within the limits of the highway east of the point of accident it was not contributory negligence as a matter of law, under the evidence, for the plaintiff to use the regularly traveled track within the limits of the highway where the accident happened. Moreover, the great weight of the evidence showed that there was no traveled track east of the point where the accident occurred. Besides, the matter was fully covered by the verdict submitted when taken in connection with the charge. The contention of the appellant was that there was a traveled way east of the place where plaintiff was injured and within the limits of the highway.

The court charged the jury respecting question 5, "Did the plaintiff's hired man plow up a traveled way which extended north and south directly east of the place where the plaintiff was injured and within the three-rod limit?"

"The town claims and contends that in 1915 there was a way or road prepared in the three-rod limits of the highway east of the fence which then was standing in the center line of the highway; that this was cleared to make a safe road for the man who was driving the milk wagon, and extended up north of the place where the accident happened; and that the plaintiff's hired man plowed it up. The plaintiff denies that

there was a way east of the one he traveled on at the place where he was injured. He claims that there was a way down south of the place where he was injured which was east of the track he was traveling on; but he claims that this way came into the way he was traveling on some six to ten rods south of the place where he was injured. If you are convinced by the preponderance of evidence that the town's contention is true, answer the question 'Yes.' If not so convinced, answer the question 'No.' "

Counsel for appellant relies upon *Nicks v. Marshall,* 24 Wis. 139; *Raymond v. Sauk Co.* 167 Wis. 125, 166 N. W. 29; and other cases in this court. An examination of the cases relied upon by counsel for appellant will show that they are readily distinguishable from the case at bar.

In *Nicks v. Marshall, supra,* the court held that the plaintiff placed himself "in the worst possible position to see approaching danger." In the instant case the evidence tends to show that plaintiff took pains to place himself in the best position to see the danger and avoid it. In *Raymond v. Sauk Co., supra,* the plaintiff, seeing the danger, deliberately ran his auto into it. In the cases relied upon by appellant the distinction is drawn between such cases and the case at bar. In 167 Wis. 125, 166 N. W. 29, the court said:

"A traveler may pass upon such a highway while knowing that it is in some respects defective, if nevertheless he exercises ordinary care in the use of such highway in view of its defective condition, and such use is not of itself, as a matter of law, contributory negligence," citing *Schmidt v. Franklin,* 164 Wis. 128, 159 N. W. 724, and *Jenewein v. Irving,* 122 Wis. 228, 99 N. W. 346, 903.

The plaintiff drove over the road safely in going to Young's place and the jury was entitled to find that he believed and had a right to believe he could pass over it safely in returning in the exercise of due care.

We are convinced that no prejudicial error was committed on the trial and that the judgment below is right and should be affirmed.

By the Court.—The judgment is affirmed.

ESTATE OF JANSA: DUSEK and another, Appellants, vs. ONUFREY, Respondent.

April 2—April 29, 1919.

Insanity: Epilepsy: Marriage: Void or voidable?

1. One may be an epileptic without being insane.
2. A marriage with an epileptic prior to the enactment of ch. 218, Laws 1917, was voidable but not void under the laws of this state.

APPEAL from a judgment of the circuit court for Pierce county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

One John Joseph Jansa, for many years a resident of Pierce county, for about fifteen years prior to his death had been subject to epileptic convulsions. On May 15, 1913, he was adjudged insane and committed to a hospital. On December 14, 1915, he was declared sane and his guardian discharged. In September, 1916, he went to Minneapolis, and while there met the respondent, a widow twenty-five years of age. About three weeks thereafter he applied for a license to marry the respondent in Wisconsin. On October 3, 1916, he obtained a second license, and was married to the respondent in Minnesota on October 9, 1916. The appellants are sisters of the deceased Jansa. The estate of Jansa was administered and assigned to the respondent as the widow. An appeal was taken to the circuit court, which held the marriage valid and affirmed the judgment of the county court. From that judgment plaintiffs appeal.

For the appellants there was a brief by *McNally & Doar* of New Richmond, and oral argument by *W. T. Doar.*

For the respondent there was a brief by *Geo. B. Skogmo, John F. Kuehnl,* and *Lynn H. Ashley* of River Falls, attorneys, and *John G. Priebe* of Minneapolis, of counsel; and the cause was argued orally by *Mr. Kuehnl* and *Mr. Skogmo.*

ROSENBERRY, J. The appellants contend that the marriage is void (1) because Jansa was insane at the time of the marriage, and (2) because a marriage with an epileptic is void under the laws of Wisconsin.

The trial court found that Jansa was not insane at the time of the marriage. Aside from the fact that Jansa was admittedly an epileptic and that it appears that his mind was to some extent affected, there is little evidence in the case to establish his insanity at the time of the marriage. It cannot be said that because Jansa was an epileptic he was therefore insane. It is a matter of common knowledge that epileptics often exhibit great intellectual power. The finding of the trial court to the effect that Jansa was not insane at the time of the marriage must be sustained. The finding that Jansa was not insane renders unnecessary the consideration of the question whether or not a marriage with an insane person is void.

It is claimed that a marriage with an epileptic is void under the laws of Wisconsin. Sub. 1, sec. 2330*m*, Stats., provides:

"If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

At the time of the marriage, October, 1916, sub. 1, sec. 4593*m*, provided: "No man and woman, either of whom is insane, mentally imbecile, feeble-minded or epileptic, shall intermarry." For violation of sec. 4593*m* sec. 4593*n* provided a penalty by fine or imprisonment, but did not provide that a marriage entered into in violation of the statute should be void.

Sub. 1, sec. 2330, Stats. 1915, provided, ". . . no insane person or idiot shall be capable of contracting marriage." By ch. 218, Laws 1917, the word "epileptic" was inserted between the word "person" and the word "or" in sec. 2330. The laws of Minnesota, where the marriage was performed, were neither pleaded nor proved; so the question arises whether or not in October, 1916, a marriage with an epileptic was void or voidable under the laws of the state of Wisconsin.

The correct doctrine is laid down in *Gould v. Gould,* 78 Conn. 242 (61 Atl. 604), at p. 245:

"A contract for any matter or thing against the prohibition of a statute is treated as void, although the statute does not declare it to be so, if such contract be relied on in any action as the foundation of the right of recovery. . . . But a contract of marriage is *sui generis.* It is simply introductory to the creation of a status, and what that status is the law determines. A contract executed in contravention of law may yet establish a status which the law will recognize, and, if one of the contracting parties were innocent of any intention to violate the law, may recognize as carrying with it in his favor the same rights and duties as if the contract had been entirely unexceptionable."

In this case the trial court found that the defendant did not know that Jansa was an epileptic, and that the marriage was entered into in good faith without any intention on the part of either of the parties thereto to violate the laws of the state of Wisconsin. The basis of the rule is fully discussed in *Gould v. Gould, supra,* and we shall not rediscuss the matter.

That it was not the understanding or intent of the legislature that a marriage made in violation of sec. 4593*m* should be considered void is further evidenced by the fact that sec. 2330 was amended in 1917 so as to make an epileptic incapable of contracting marriage. It is argued that *Gould v. Gould* is not in harmony with the law of Wisconsin, particularly with the conclusions reached in *Lanham v. Lanham,* 136 Wis. 360, 117 N. W. 787. While there is considerable

force to the argument that under the laws of Wisconsin the same reasons do not exist for declaring a marriage voidable rather than void, inasmuch as issue born as a result of a marriage thereafter annulled is not bastardized, nevertheless we are of the opinion that a marriage with an epileptic prior to the enactment of ch. 218, Laws 1917, was voidable and not void under the laws of this state.

By the Court.—Judgment affirmed.

ELKEY, Appellant, vs. CITY OF SEYMOUR, Respondent.

April 2—April 29, 1919.

Relief and support of the poor: Who entitled to relief: Ownership of property: Contract by city for relief: Discharge of obligation: Offer of payment: Substitution of debtors: Attorneys at law: Remedies of city.

1. A contract by which the lawful authorities of a city employed plaintiff to relieve the immediate necessities of a person as being one with whose relief the city was chargeable, is binding upon the city.
2. Plaintiff in such case, though bound to know or ascertain at her peril the scope of the power of the city officials making the contract, was not bound to ascertain whether the person to be relieved was lawfully entitled to such relief from the city. That duty rested upon said officials.
3. An aged, infirm woman, having a lawful settlement in a city, who was dangerously ill and had no immediate family who could obtain food and shelter for her and was without any present ability to pay for the immediately needed care, nursing, and shelter, was entitled to relief from the city, within the intent of sec. 1499, Stats.
4. Under the statutes a material distinction exists between relief and support of poor persons.
5. The mere present ownership of property which may subsequently become available to recompense a city for relief or support furnished to the owner, does not create a jurisdictional lack of authority in the proper officials to furnish a contract for the furnishing of such aid.
6. Although plaintiff, who had been employed by the proper officials of a city to furnish relief to a poor person, refused a subsequent offer of such officials to pay her for her services, say-

ing that she would not look to the city but to the attorney of the person relieved, her right to recover from the city was not in any way affected by such refusal, no tender of the amount due having been actually made or kept good.

7. To effect a substitution of debtors, the consent of three, the creditor, the old debtor, and the new debtor, is required.
8. The attorney of the person to whom relief was given, not being shown to have been the attorney or agent of the plaintiff, a payment of money to such attorney by a debtor of the person relieved was not in any way a discharge of the obligation of the city to the plaintiff upon the contract under which the relief was furnished.
9. If there is property or money in which the person who received relief has or had an interest which may be properly chargeable for such relief, the city has ample remedy under sec. 1505*a*, Stats.

APPEAL from a judgment of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

On February 19, 1915, one Mrs. Henrietta Pioch, then seventy-four years of age or more, was dangerously ill with pneumonia in the city of *Seymour*. At the express request of Dr. Finkle, chairman of the committee on poor of the common council of said city, and with the knowledge and consent of other members of that committee, the plaintiff was hired to care for and nurse Mrs. Pioch, and provide board and room, in plaintiff's own house. The plaintiff did so nurse and care for Mrs. Pioch from that time until April 19, 1915.

At the time of this employment Mrs. Pioch had no immediate family of her own and no property, means of support, or resources other than a claim against her nephew, Herman Eich. This claim was based upon the situation arising between Mrs. Pioch and the nephew by reason of the conveyance, ten or twelve years prior to that time, by her to him of real estate then owned by her, with an agreement by him that he was to provide and care for her during the balance of her life. Subsequent to such conveyance there had been a bond given, apparently as additional security by the nephew to

Mrs. Pioch, with a penalty of $500 expressed therein, conditioned upon his complying with the agreement aforesaid upon which the conveyance had been made. Mrs. Pioch had left her nephew for a long time prior to February, 1915, and had received no support from him in any manner for quite a time. The plaintiff's attorney herein, E. C. Smith, had, shortly before February 29th, been substituted as Mrs. Pioch's attorney in that other lawsuit, and negotiations were then pending for a settlement of the same.

It was settled in June, 1915, by the payment by the nephew to Mr. Smith, as such attorney, of the sum of $825, and a release was then given by Mrs. Pioch to the nephew of all claims on her part against him. A part of the $825 thus received was used by Mr. Smith in paying certain claims against Mrs. Pioch, some of which were outstanding at the time of the employment of the plaintiff in February, 1915. Among such bills so paid was one to Dr. Holtz of about $36 for medical attendance during this particular illness, and another of about $160 to a Mrs. Rohloff, with whom Mrs. Pioch had been living after leaving her nephew's home and prior to going to the home of the plaintiff. On April 16th Dr. Finkle with several other members of the committee on poor of the common council, together with one Carl Eich, brother of Mrs. Pioch and father of Herman Eich, came to plaintiff's home and with money furnished to Dr. Finkle by Herman Eich offered to pay the plaintiff the amount of her bill. There is some dispute as to what was said at the time, but it appears that the money was not received by *Mrs. Elkey* then, and there is testimony tending to show that she then stated she would not look to the city for the compensation for her services but instead would look to Mr. Smith, the then attorney for Mrs. Pioch. The money to pay plaintiff's claim was not actually tendered at the time nor was it subsequently paid into court or held for plaintiff's use in any manner.

Plaintiff filed a claim for such services to the amount of

$72.75 with the common council. She appealed from what she claimed was a disallowance of the claim to the circuit court, and the issues that appeared to be raised between the parties on such trial are sufficiently indicated from the special verdict which was submitted to the jury and which was in substance, as answered, as follows:

"(1) Was Henrietta Pioch, on or about the 19th of February, 1915, in need of relief as a poor person and without money or property to pay her support and maintenance and medical aid? *A.* No."

(2) Plaintiff did nurse, board and lodge Mrs. Pioch between February 19th and April 19th.

(3) The plaintiff was so employed by the committee on poor of the defendant city.

(4) The services rendered and the board and lodging furnished by plaintiff were reasonably worth $72.75.

(5) The committee on poor offered to pay the plaintiff's claim on April 16th at the time her brother came to take Mrs. Pioch away from plaintiff's residence.

(6) The committee at that time had the money or means ready to pay the claim of the plaintiff.

(7) Between February 19 and April 19, 1915, Mrs. Pioch owned a mortgage securing a bond for her support on real estate given by her nephew and then in full force and effect.

(8) The plaintiff on April 16th refused to accept any pay from the defendant city and informed the committee that she would not look to the defendant city but would look to Smith, Mrs. Pioch's attorney, for her pay.

(9) There was an agreement or understanding between Smith and the plaintiff that the said Smith would collect any claim the plaintiff may have against the defendant for the nursing, board, and lodging of Mrs. Pioch from Herman Eich out of any funds received in the action then pending between those two.

(10) It was a part of the consideration of the settlement between Mrs. Pioch and Herman Eich that the claim of the plaintiff was to be paid out of the $825 paid on such settlement by Herman Eich.

The plaintiff moved to change the answers returned by the jury to questions (1), (5), (8), (9), and (10) and to strike

out the answer to the sixth question, and for judgment or for a new trial.

The plaintiff's motions were severally denied and the defendant's motion for judgment upon the verdict was granted, and thereupon judgment was entered dismissing the plaintiff's complaint with costs. From such judgment plaintiff has appealed.

For the appellant the cause was submitted on the brief of *E. C. Smith* of Seymour.

For the respondent there was a brief by *Rooney & Grogan* of Appleton, and oral argument by *F. J. Rooney*.

ESCHWEILER, J. Under the law as it stood at the time the plaintiff undertook to care for Mrs. Pioch, the defendant city was under the provisions of the general statutes relating to the care of the poor, including sec. 1499, Stats., which reads:

"Every town shall relieve and support all poor and indigent persons lawfully settled therein whenever they shall stand in need thereof except as hereinafter provided."

There can be no question under the evidence in this case but that Dr. Finkle, chairman of the committee of the city poor, together with other members of the committee who knew of and acquiesced in his action, were the recognized and lawful authorities and representatives of the city to do the very thing which they undertook to do with the plaintiff, namely, to employ her to relieve the immediate necessities of Mrs. Pioch on February 19th, she then being lawfully settled in said city.

There is here no question as to their authority to bind the city such as was presented in the case of *Hittner v. Outagamie Co.* 126 Wis. 430, 105 N. W. 950.

The jury having very properly found that the lawful authorities of the city made the contract with the plaintiff, the contract thus made bound the defendant. *Dakota v. Winne-*

conne, 55 Wis. 522, 13 N. W. 559; *Beach v. Neenah,* 90 Wis. 623, 64 N. W. 319.

While it was incumbent upon the plaintiff, dealing with public officials, to know or ascertain at her peril the scope of the powers of such public officials, she was not required to examine further and to ascertain whether or not the person to whom such lawful authorities proposed to grant relief, as to Mrs. Pioch in this case, did or did not meet the calls of the statute which prescribed the duties and obligations of such authorities in the care of the poor. That duty rested upon such officers.

At the time in question Mrs. Pioch was old, infirm, and dangerously ill with pneumonia; she could no longer remain in the house of Mrs. Rohloff, with whom she had been staying for some time and to whom she was already indebted for board and lodging to the amount of $160; she had no immediate family to whom she could go or who were in a position to obtain food and shelter for her; she was without any present ability to pay for the immediately needed care, nursing, and shelter, and her position was such that the court could well say, under the undisputed evidence in this case, that she was then entitled to relief from the city within the intent of sec. 1499, Stats. It was a question of relief rather than of support, and the material distinction between the two has been pointed out. *Coffeen v. Preble,* 142 Wis. 183, 125 N. W. 954. The first and seventh questions of the special verdict therefore are considered immaterial.

Sec. 1505*a,* Stats., first created by ch. 136, Laws 1899, provides in substance that if any person who receives any relief or support under the provisions of the same chapter in which is found sec. 1499 was, at the time of receiving such relief or support, the owner of property, then the value of such relief and support shall be deemed a legal and valid claim and debt against such person, and the municipality furnishing the same may sue for and collect the value thereof against such

person, and no statute of limitations shall be pleaded in defense thereto. This indicates quite clearly that it is not the intent of the legislature to make the mere present ownership of property subsequently available to recompense for such relief or support a jurisdictional lack of authority in the proper officials to furnish or contract for the furnishing of such aid.

It is contended that plaintiff must be denied relief because on April 16th, when an offer was made by the chairman of the committee to pay her for such services, she refused the same and stated that she would not look to the city but to Mr. Smith, the then attorney for Mrs. Pioch. And further, on the ground that there was an agreement, as found by the jury, made between plaintiff and Smith that the said Smith would collect the plaintiff's claim out of the funds to be received from the proceedings then pending between Mrs. Pioch and her nephew. And lastly, because, as found by the jury, there was an agreement between the nephew and Smith, at the time of the settlement in June, 1915, that out of the $825 paid by the nephew to Smith as Mrs. Pioch's attorney in settlement of the suit between those two, this claim of the plaintiff should be paid.

We do not think any of these grounds are well taken. The offer to pay made by the committee and refused by *Mrs. Elkey* at that time was not a discharge of the obligation then lawfully subsisting between the plaintiff and the city. The only effect of such offer, if the same had been kept good by payment of the money into court or holding the same for the benefit of the plaintiff, would be to affect the question of interest and costs. There was no such tendering or maintaining of the same as affected the rights of the parties in this action.

There was no substitution of debtors. It requires the consent and agreement of three, the creditor, the old debtor, and the new debtor, to effect such a substitution. *T. W.*

Stevenson Co. v. Peterson, 163 Wis. 258, 157 N. W. 750. There is no evidence that at the meeting on April 16th Mrs. Pioch consented to any such proposal, nor is there evidence of any implied or express authority in Mr. Smith, her then attorney, or any one else, to give consent to such substitution of debtors.

There is no evidence in this case which will warrant the conclusion that the payment by the nephew, Herman Eich, of the $825 to Mr. Smith was a payment to the plaintiff of the obligation then subsisting from the defendant to her. It is undisputed that she has not received the money herself. At that time Mr. Smith was Mrs. Pioch's attorney, and the only evidence as to any transactions between him and the plaintiff with reference thereto is to the effect that he suggested to plaintiff that she should reduce the amount of her claim so as to increase the amount that would result to Mrs. Pioch in the proposed settlement with the nephew. There is no support, therefore, for the conclusion that Mr. Smith was occupying a position of such conflicting interests as that of being attorney for Mrs. Pioch, interested in reducing as much as possible plaintiff's claim, and at the same time the agent and attorney for the plaintiff, charged with the duty of collecting, if possible, the full amount of the plaintiff's charges.

If there be property or money in which Mrs. Pioch has now or has had an interest which may be properly chargeable for the relief given to her by the defendant under the contract with the plaintiff, there is ample remedy for the defendant to obtain the same under the provisions of sec. 1505*a*, *supra*. It follows, therefore, that the court should have directed judgment for the plaintiff for the amount of her claim, with interest and costs.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment for the plaintiff for the amount found by the verdict.

STATE EX REL. BEATTIE, Respondent, vs. BOARD OF EDUCATION OF THE CITY OF ANTIGO, Appellant.

April 3—April 29, 1919.

Public schools: Exclusion of child whose presence is harmful: Powers of school board: Formal action: Interference by courts: Burden of proof.

1. The right of a child of school age to attend the public schools of this state cannot be insisted upon when his presence therein is harmful to the best interests of the school.
2. A board of education which, under the law, had "in all respects the supervision and management of the common schools" of a city, with power to make "rules and regulations for their organization, government or instruction, . . . and the transfer of pupils from one department to another, and generally for their good order and advancement," had power, acting in good faith, to determine that, by reason of his physical condition and ailments, the presence of a boy in school was harmful to the school and to other pupils, and that therefore he should be excluded.
3. Such a determination by a school board should not be interfered with by the courts unless it is shown to have been illegal or unreasonable.
4. Although, in the first instance, the exclusion of the boy from the schools was not the result of action taken at a formal meeting of the board, yet, when the board at a subsequent regular meeting conferred upon the question whether he should be reinstated, and a motion that he be reinstated received no second, this amounted to a determination by the board, acting as such, that he be excluded.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the municipal court of Langlade county: T. W. HOGAN, Judge. *Reversed.*

This is an action of *mandamus* brought in the municipal court of Langlade county to compel the *Board of Education of the City of Antigo* to reinstate and admit petitioner's son to the public schools of said city. From a judgment in favor of the petitioner the defendant *Board of Education* appealed.

Merritt Beattie, thirteen years of age on March 27, 1918, son of petitioner, has been a resident of the city of Antigo

since he was two years of age. Merritt has been a crippled and defective child since his birth, being afflicted with a form of paralysis which affects his whole physical and nervous make-up. He has not the normal use and control of his voice, hands, feet, and body. By reason of said paralysis his vocal cords are afflicted. He is slow and hesitating in speech and has a peculiarly high, rasping, and disturbing tone of voice, accompanied with uncontrollable facial contortions, making it difficult for him to make himself understood. He also has an uncontrollable flow of saliva which drools from his mouth on to his clothing and books, causing him to present an unclean appearance. He has a nervous and excitable nature. It is claimed on the part of the school board that his physical condition and ailment produces a depressing and nauseating effect upon the teachers and school children; that by reason of his physical condition he takes up an undue portion of the teacher's time and attention, distracts the attention of other pupils, and interferes generally, with the discipline and progress of the school. He did not walk until he was six or seven years of age and did not attend school until he was eight years old. He then entered the first grade of the Antigo public school and continued therein until he was through the fifth grade in 1917. It appears that he is normal mentally and that he kept pace with the other pupils in the respective grades, although the teachers had difficulty in understanding him, and he was not called upon to recite as frequently as the others for the reason that he was slow in speech, requiring more time for him to recite than the other pupils. The city of Antigo maintains a day school under sec. 41.01, Stats., "for the instruction of deaf persons or persons with defective speech." In the fall of 1916 he was placed by the school authorities in this department. He remained there five weeks, when he was transferred to the Fourth Ward public school. During the school year of 1916 and 1917 a representative of the state department of public instruction visited the Antigo

schools. The boy Merritt came under her observation and she protested against his being in the public schools and suggested that he be placed in the department for instruction of deaf persons or persons with defective speech. Merritt refused to attend this department, in which he was upheld by his parents and family. At the beginning of the school year in 1917 Merritt presented himself to the Second Ward public school, but on the second day those in charge refused to accept him as a pupil. The matter was taken by the parents to the superintendent of schools and finally laid before the *Board of Education.* On September 13, 1917, the *Board of Education* had a regular meeting to consider the demand of the petitioner that his son be reinstated and admitted to the public schools. The matter was considered for an hour, during which time one member of the board moved that the boy be reinstated in the schools. This motion did not receive a second, and after some further discussion it was agreed that the matter should be presented to the state superintendent of public instruction. It appears that correspondence followed between the secretary of the school board and the state superintendent upon the question as to whether Merritt should be reinstated, but it does not appear that the state superintendent ever definitely advised the school board upon the subject and the school board never reinstated the boy. As above stated, the petitioner brought this action to compel his reinstatement. The case was tried before a jury. A general verdict in favor of the petitioner was returned.

For the appellant there was a brief by *Finucane & Avery* of Antigo, counsel, and oral argument by *Chas. H. Avery.*

For the respondent there was a brief by *Goodrick & Morson* of Antigo, and oral argument by *H. F. Morson* and *E. J. Goodrick.*

OWEN, J. The right of a child of school age to attend the public schools of this state cannot be insisted upon when

its presence therein is harmful to the best interests of the school. This, like other individual rights, must be subordinated to the general welfare. It will be conceded, we think, that the foregoing statement of facts presents a fair question as to the effect of the boy's presence upon the school and the individual pupils attending the same. The question then arises as to what body or tribunal is vested with the authority of determining the question. The trial court seemed to be of the opinion that, while such authority rested with the school board in the first instance, its action in that behalf was reviewable by a jury and subordinate to the jury's opinion thereon, as indicated by its charge to the jury to the effect that "It is incumbent upon the defendant to prove to you the needfulness of the rule in denying Merritt Beattie the privileges of the graded school by a fair preponderance of the evidence." The power of the school board in the premises is set forth in sub. 5, sec. 101, ch. 197 (vol. II), Laws 1889, as follows:

"To have in all respects the supervision and management of the common schools of said city, and from time to time, to make, alter, modify and repeal as they may deem expedient. rules and regulations for their organization, government or instruction, . . . and the transfer of pupils from one department to another, and generally for their good order and advancement."

The situation here presented aroused the power of the board under that provision of law. Having acted, its determination should not be interfered with by the courts unless it acted illegally or unreasonably. *State ex rel. Dresser v. District Board,* 135 Wis. 619, 116 N. W. 232; *Watson v. Cambridge,* 157 Mass. 561, 32 N. E. 864; *Kinzer v. Independent School Dist.* 129 Iowa, 441, 105 N. W. 686. That it acted legally is without question. That it acted unreasonably cannot be said. The duty confronting the school board was a delicate one. It was charged with the responsibility

of saying whether this boy should be denied a constitutional right because the exercise of that right would be harmful to the school and to the pupils attending the same. He should not be excluded from the schools except for considerations affecting the general welfare. But if his presence in school was detrimental to the best interests of the school, then the board could not, with due regard to their official oaths, refrain from excluding him, even though such action be displeasing and painful to them. The record convinces us that the board took this view of the situation and considered the question with the highest motives and with a full appreciation of its responsibility. There is no suggestion that any of the members were prompted by bad faith or considerations of ill will. The action of the board in refusing to reinstate the boy seems to have been the result of its best judgment exercised in good faith and the record discloses no grounds for the interference of courts with its action.

There is one other question which should be noticed. It is claimed that the school board never acted as a body upon the question of the exclusion of the boy from the schools and that its action is void within the rule "that when a board of public officers is about to perform an act requiring the exercise of discretion and judgment the members must all meet and confer together, or must all be properly notified of such meeting, in order to make the action binding. Individual and independent action, even by a majority of the members of the board, will not suffice." *McNolty v. Board of School Directors,* 102 Wis. 261, 78 N. W. 439. It is true that the exclusion of the boy in the first instance was not the result of the action of the *Board of Education* taken at a formal meeting thereof. However, at its meeting on September 13th the board did meet as a board and conferred upon the question as to whether he should be reinstated. A motion was made that he be reinstated, which motion received no second. This amounted to a refusal on the part of the board, acting as a

board, to permit him to attend the public schools of the city. The point is not well taken.

The action of the school board, unless illegal or unreasonable, is not subject to the interference of the courts, from which it follows that the complaint of the petitioner should be dismissed.

By the Court.—Judgment reversed, and cause remanded with instructions to dismiss the petition.

ESCHWEILER, J. (*dissenting*). I cannot agree with the result arrived at in the majority opinion in this case for two reasons:

First, because, even under the rule of law adopted by the majority as to the power vested in the school board, it was still a question for the jury as to whether or not there was an unreasonable interference with plaintiff's rights, there being no evidence that as a fact this boy's presence did have any harmful influence on the other children.

Second, because I believe there is no such exclusive power intended to be vested in such school board.

Those who drafted the constitution of this state evidently intended to secure to every child a substantial and fundamental right to attend the common schools. Sec. 3, art. X, Const., reads as follows:

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; *and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years;* and no sectarian instruction shall be allowed therein."

Unquestionably the right of the individual child under such constitutional provision is subject to the equal rights of all other children to the same, and when the attendance of any one child in the public school is a material infringement upon the rights of other children to also enjoy the benefits of free schooling his right must yield.

The majority opinion finds the warrant for the construction it gives to the power of the school board in this case upon the statute giving such school boards the supervision, management, and control of the common schools. I cannot agree that a statutory power can be exalted above a guaranty of the constitution. Even were the statute to say, as it does not, that the decision of such a school board is to be exclusive and controlling save and except the one complaining of the exercise thereof is able to show that the exercise of such power by the school board was arbitrary and unreasonable, it would be subject to the substantial objection that it placed an unwarranted burden of proof upon one deprived of a constitutional right.

I think the burden was properly laid, by the instruction given by the trial court to the jury in this case, upon the defendants to show that their action was a reasonable exercise of their statutory duty. If they were unable to convince a jury to that effect their order should be set aside.

Not one of the cases cited in the majority opinion considered any such constitutional privilege as here suggested. The former decision of this court cited does not mention such provision. The Iowa constitution, particularly, expressly grants just such power as is contained in our statute to such board in one of the fifteen subsections of art. IX of that document relating to a board of education. The Massachusetts constitution contains no provision like ours.

ZEH, Respondent, vs. MCCORMICK, Appellant.

April 3—April 29, 1919.

Appeals from justices' courts in Outagamie county: To what court taken: Jurisdiction: Waiver of objections: "Subject matter:" Trial de novo: Defective appeal: Supplying affidavit inadvertently omitted.

1. An action in a justice's court of Outagamie county wherein judgment was rendered for the defendant for costs only was not an action "where the amount of damages or value of property recovered, exclusive of costs, [did] not exceed fifty dollars," within the meaning of sec. 39, ch. 23, Laws 1907, which limits appeals in such actions to the municipal court of the county. The class of actions so described was intended to be confined to cases in which *some* damages or property is recovered.
2. Appellate jurisdiction in certain cases appealed from the justices' courts in a county may be vested in the municipal court of the county, to the exclusion of the circuit court.
3. Where, under sec. 39, ch. 23, Laws 1907, an appeal from a justice's judgment was authorized either to the circuit court or to the municipal court of Outagamie county at the election of the defendant (the successful party), and plaintiff appealed to the circuit court and return was duly made to that court, the defendant, under sec. 2836*a*, Stats., waived all objections to the jurisdiction of that court over person or subject matter by appearing therein and procuring a continuance before objecting to its jurisdiction. The words "subject matter" in said sec. 2836*a* are used in the narrow sense as meaning the subject matter of that particular lawsuit.
4. Where, in such case, the plaintiff so appealing desired a trial *de novo*, but inadvertently omitted at the time to file an affidavit, under sub. (2), sec. 3768, Stats., that he had a valid claim exceeding $15, the appeal was defective within the meaning of sec. 2836*a*, Stats., and the circuit court thereafter properly allowed such affidavit to be filed.

APPEAL from a judgment of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

Plaintiff sued in a justice's court of Outagamie county for money had and received in the sum of $95. Trial was had and judgment rendered for the defendant for costs only,

February 10, 1917, from which judgment plaintiff appealed to the circuit court for Outagamie county by filing a notice of appeal and undertaking. No affidavit to the effect that the plaintiff had a valid claim exceeding $15, under the provision of sub. (2), sec. 3768, Stats., was made or filed with the notice of appeal, and hence the plaintiff was not entitled to a trial *de novo,* but only to a trial upon the record. Return was duly made to the circuit court pursuant to the appeal, and at the first term thereafter the cause was continued generally on motion of the defendant and trial by jury waived. At the following term the case was duly called for trial before the court, and before any testimony was given the plaintiff's attorney moved for leave to file at that time an affidavit inadvertently omitted at the time of taking the appeal, stating that he had a valid claim exceeding $15, and thus secure a trial *de novo.* The defendant objected to the motion on the ground that the court had no jurisdiction and moved for dismissal on the same ground. The circuit judge offered to allow the defendant to make an affidavit of surprise and thus secure a continuance, and also offered to call in the municipal judge of Outagamie county or send the case to the municipal court, or transfer the cause to the jury calendar, all of which offers were refused by the defendant, and the defendant's counsel declined to proceed and withdrew from the case. Thereupon the trial proceeded before the court, the plaintiff introduced his proofs, and the court made findings of fact and conclusions of law entitling plaintiff to judgment for $95 and costs, upon which judgment was afterwards entered, and the defendant appealed.

For the appellant the cause was submitted on the brief of *Ryan, Cary & Frank* of Appleton.

For the respondent there was a brief by *Martin, Martin & Martin* of Green Bay, and oral argument by *P. H. Martin* and *John E. Martin.*

WINSLOW, C. J. The act creating the municipal court of Outagamie county provides that appeals from justices' courts in civil actions, "where the amount of damages or value of property recovered, exclusive of costs, shall not exceed fifty dollars," shall be taken to the municipal court; and in all other cases to either the circuit or the municipal court at the election of the successful party, such election to be exercised after the appeal is taken in ways provided for by the act. Sec. 39, ch. 23, Laws 1907.

The first question for decision is whether the present case fell within the first class, *i. e.* was it a case where the amount of damages recovered exclusive of costs did not exceed $50? The argument on one side is that the class is confined to cases where *some* damages or property is recovered, and on the other side that when no damages are recovered the case is one where the amount of damages does not exceed $50. It is not so important how this question is decided so that it be in fact decided, and, without spending time to discuss the matter, we content ourselves with holding that the case does not come within the class because that class is intended to be confined to cases of recovery of damages or property, and as there was no such recovery here the case comes within the other class.

In passing it may be said that there is no constitutional objection to the vesting of such appellate jurisdiction in the municipal court to the exclusion of the circuit court. *Taylor v. De Camp,* 68 Wis. 162, 31 N. W. 728.

It was a case, therefore, where an appeal was authorized under certain circumstances to the circuit court, and, it appearing that return was duly made to that court, sec. 2836*a*, Stats., applies. That section provides in substance that when an appeal is attempted to be taken in an action where an appeal is authorized to be taken to any court and return is duly made to such court, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of

the appeal or the jurisdiction of the appellate court over person or subject matter, unless he makes his objection to the jurisdiction before taking or participating in the taking of any other proceedings in the latter court. The words "subject matter" are here evidently used, not in the broad sense as meaning such litigation in the abstract, but in the narrower sense as meaning the subject matter of that particular lawsuit, *i. e.* in the same sense in which they are used in that long line of decisions, of which *Palmer v. Peterson,* 46 Wis. 401, 1 N. W. 73, and *Telford v. Ashland,* 100 Wis. 238, 75 N. W. 1006, are typical, which held that a substantial defect or omission in the appeal papers deprived the appellate court of jurisdiction of the subject matter, which could not be waived by general appearance of the party in court. *Read v. Madison,* 162 Wis. 94, 155 N. W. 954.

It seems plain to us that the section applies to the present case, and that by appearing in the circuit court and procuring a continuance before making his objection to the jurisdiction the defendant waived all objections to the jurisdiction of the circuit court, that being a court which has general jurisdiction of actions to recover for money had and received and also one of the courts to which the appeal in the present case was authorized to be taken.

The last question presented is whether the court properly allowed the affidavit to be filed which should have been filed at the time of taking the appeal in order to obtain a trial *de novo.*

Here, too, we think sec. 2836*a* governs the case and justifies the court's ruling. That section provides in substance that, when a motion to dismiss a defective appeal in such a case is made, the court may in its discretion allow defects or omissions in the appeal papers to be supplied with the same effect as if the appeal had been properly taken. In one sense the appeal papers here were not defective; that is, there was an appeal which would allow the court to try the case on the

justice's record. But if the appellant desired a trial *de novo* the papers were defective because no affidavit of claim exceeding $15 was filed as required by sec. 3768, Stats., in order to obtain a new trial. The court acquired no jurisdiction to try the case anew in the absence of the affidavit, and, if the appellant desired and intended to obtain such relief, the appeal was defective in a very real sense to that extent.

The trial court states in his findings of fact that the plaintiff moved for permission to file the affidavit "inadvertently omitted" at the time of taking the appeal in order to permit a trial *de novo*. We regard this as substantially a finding that the omission to file the affidavit at the time of the appeal was an inadvertent omission in the course of an attempt to take an appeal which would entitle the appellant to a new trial. The practice would have been much better had an affidavit been filed showing the facts as to the omission, but there are no exceptions to the facts found by the trial judge, and so far as the record shows substantial justice seems to have been done.

By the Court.—Judgment affirmed.

BEHREND and wife, Respondents, vs. BUCHMANN and wife, Appellants.

April 3—April 29, 1919.

Homestead: Boundary agreement: Consent of wife: Selection by husband of portion of town lot to constitute homestead: Injunction: Trespass: Threats to continue: Appeal: Review: Findings.

1. Findings not against the clear preponderance of the evidence will be approved on appeal.
2. Land involved in an agreement as to the boundary line of town lots was not the homestead of one of the parties requiring the wife's consent to such agreement, where the land had not been acquired by such party by his deed and had been in possession of his adjoining owner and predecessors for eighteen years, and where the lot of such party was more than a quarter of

an acre, since by making the boundary agreement the party designated as his homestead land other than that involved in the agreement.

3. A husband, owner of the town lot upon which he and his wife live and which exceeds one quarter of an acre in area, is competent to select the portion of the lot to constitute the homestead.
4. Where landowners and their children have repeatedly trespassed upon adjoining lands and threaten to continue to do so, the adjoining owner may restrain such trespass.

APPEAL from a judgment of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

This action was brought by the plaintiffs to enjoin trespass by defendants on plaintiffs' lands.

Robert and *Ida Behrend* and *Fred Buchmann* were owners of adjoining lots in the village of Hortonville, Wisconsin, on November 12, 1914. For several years prior to this date there had existed a difference of opinion and some dispute between the plaintiffs and the defendant *Fred Buchmann* as to the division line between their respective tracts of land as described in their respective deeds. For the purpose of settling the dispute and of establishing permanently a boundary line between themselves, the plaintiffs and the defendant *Fred Buchmann,* on November 12, 1914, entered into an agreement in writing whereby a certain line was agreed upon and located as the partition line of their lands. In accordance with this agreement the plaintiffs, after November 12, 1914, rebuilt and moved their barn, which had previously overlapped the line agreed upon, so that the foundation now stands some twelve or thirteen inches away from the line. The defendants also moved a woodshed easterly and away from such line.

The court found, among other things, that the plaintiffs and their predecessors have been in possession and occupancy of the lands lying next west and up to the agreed line since 1896, and that the defendants have not used or occupied any portion thereof, except on several occasions to drive in

with a team on the driveway extending along and on the plaintiffs' premises just west of the agreed line, and except as they trespassed thereon after the agreed line of division had been located; that the tract of land owned by *Fred Buchmann* and occupied by him and his family exceeds in area one-fourth acre of land with dwelling-house and other buildings appurtenant thereon, and no part of the tract of land lying west from and next to and including said agreed line is a part of the land acquired by deed by *Fred Buchmann* and is not a part of the homestead of the defendants; that upon the divorce of the *Buchmanns* on October 2, 1916, *Fred Buchmann* conveyed his land above described to *Lena Buchmann;* that since April, 1916, and before the commencement of this action the defendants by themselves or their children have repeatedly and wilfully interfered with and trespassed upon the possession of the plaintiffs of the tract of land lying just west of and next to said agreed line and threaten to continue such trespass. The court found also that the acts of trespass committed by the defendants or their children were very limited as to pecuniary damage, and for the purposes of this action assessed against them damages at six cents.

Judgment was entered finding the agreed line to be the proper line between the lands of the parties and enjoining the defendants from trespassing on the lands of the plaintiffs or from interfering with them in any way. Six cents damages and costs were also adjudged to the plaintiffs. This is an appeal from such judgment.

The cause was submitted for the appellants on the brief of *Francis S. Bradford* of Appleton, and for the respondents on that of *John Bottensek* of Appleton.

SIEBECKER, J. It is contended that the court erred in finding that the land lying west of the line located and agreed upon by plaintiffs and defendant *Fred Buchmann* on November 12, 1914, as the correct division line between their properties, did not constitute a part of defendants' homestead and

that plaintiffs had been in actual possession and occupancy of these lands lying west of such line since 1896. It cannot be said that these findings are against the clear preponderance of the evidence, and hence they must be approved. The claim is made that the agreement of defendant *Fred Buchmann,* the husband of *Lena Buchmann,* by which he and the plaintiffs established the division line between their respective properties in November, 1914, has no validity in law because it conveyed part of defendants' homestead without consent of *Lena,* then the wife of *Fred Buchmann.* This claim is not well founded, because: first, the fact is established that the land west of the line is not a part of the premises defendants acquired under their deed and it is established that plaintiffs have been in actual occupancy and possession thereof since 1896; and secondly, since the land occupied by defendants on which their home is located is east of the division line agreed upon in November, 1914, and exceeds in area one quarter of an acre, it was legally competent for *Fred Buchmann,* the husband, and owner of the property, to select it as their homestead. *Fred Buchmann's* agreement with the plaintiffs, by which they established the designated division line, constituted a selection of what area was his homestead, and the homestead rights of his wife, *Lena,* attached to the area he so selected.

From this it follows that no part of their homestead was affected by the agreement fixing the division line between the property of plaintiffs and defendants.

The court found that defendants have repeatedly trespassed upon plaintiffs' premises and threatened to continue to do so. It is manifest that under the facts and circumstances of the case this equitable remedy restraining defendants from continuing these threatened wrongs is an appropriate and the only adequate remedy to protect the plaintiffs against the invasion of their legal rights to the property in question. We find no reversible error in the record.

By the Court.—The judgment is affirmed.

MENTING and others, Respondents, vs. GERMANIA FIRE INSURANCE COMPANY and others, Appellants.

April 3—April 29, 1919.

Fire insurance: Proofs of loss: Statute: Pleading: Sufficiency: Abatement: Special pleading.

1. Sub. 5, sec. 1946*i*, Stats., providing that proofs of loss shall not be made under fire insurance policies unless immediate notice of the fire be given to the chief of the fire department or to the state fire marshal, does not preclude an insured who did not give such notice from suing, at least where the defendant insurer failed to reject the proofs for the specific reason that the statute had not been complied with.
2. Denial by the insurer that the insured had fulfilled all the policy conditions or that the proofs of loss conformed to the policy is not a plea that the insured had failed to give the notice required by sub. 5, sec. 1946*i*.
3. Where the failure of the insured to give immediate notice of the fire as required by sub. 5, sec. 1946*i*, would have only abated the suit against the insurer because prematurely brought, the objection that such notice was not given does not go to the merits and must be raised by special pleading.

APPEAL from a judgment of the municipal court of Langlade county: T. W. HOGAN, Judge. *Affirmed.*

The appeal is from a judgment in favor of plaintiffs entered in a consolidation of several actions upon several insurance policies in the municipal court of Langlade county.

On October 4, 1917, a fire destroyed a quantity of lumber on the premises of and near the sawmill of the firm of Menting & Hickey at Pence Lake, Langlade county, Wisconsin. The policies were, as originally issued or subsequently changed, to the firm of Menting & Hickey as assured, with a provision that the loss or damage if any was payable to *Wolf River Lumber Company,* plaintiff herein, which had an interest in the property destroyed secured by mortgage. Proofs of loss were sent by the insured to the various insurance companies on December 1st. On January 29, 1918, at

the request of some or all of the insurance companies, an examination was had of plaintiff *Hickey* and certain officers or employees of the *Wolf River Lumber Company.* On February 1st separate actions were commenced, some in the circuit court and some in the municipal court of Langlade county, against the several insurance companies upon the respective policies. Thereafter, upon due proceedings had, the several actions were consolidated and trial had upon such consolidation in the municipal court. Upon the issue presented as to whether or not the plaintiff *Mrs. Menting,* or her husband, was the proper party plaintiff as a member of the firm of Menting & Hickey, the jury found that *Mrs. Menting* was such partner. They also found in the special verdict that the plaintiff *Wolf River Lumber Company* did not procure the fire to be set and that the fire was not set with the assent and connivance of the plaintiffs *Menting* and *Hickey* or either of them. By the sixth question they found that neither of the plaintiffs swore falsely touching any matter relating to the insurance, either in the proofs of loss furnished by them or in their examination held under the terms of the policy. And by the seventh question that none of the plaintiffs made any false representations or statements for the purpose of deceiving the insurance companies and the obtaining from them a greater amount of insurance than the plaintiffs were entitled to receive. By their answer to the third question they found the quantities and respective values of the different kinds of lumber destroyed by the fire.

Attached to each and following each of the policies in suit was a detachable clause reading:

Notice of Fire Loss. (Detach and mail.)
Date and hour, ...
Probable cause, ...
Place of fire, ...
Probable amount of damage, $.....
(Signed) .....
(Owner or occupant.)

Immediately following the same and as part thereof was sub. 5, sec. 1946*i*, Stats., reading:

"The occupant and owner of any premises upon which any fire shall occur shall immediately give written notice thereof, specifying the time, place, amount of damage, and cause so far as known, to the chief of the fire department when the property is located where there is a fire department, or if there be none, then to the state fire marshal at Madison, Wisconsin. Such notice may be sent by mail. No proof of loss under any policy of insurance shall be made until such notice has been given by or in behalf of such occupant or owner, and a notice given by one shall be sufficient for both the owner and occupant. A form for such notice, approved by the state fire marshal, reciting this subsection, shall be attached to every policy of fire insurance issued in this state."

Upon the trial it appeared that such notice had not been detached from any but one of the policies of insurance, and upon cross-examination of certain of the plaintiffs it appeared that none of them had taken any steps to notify the state fire marshal (there being no fire department at the place where the fire occurred) of such fire. It did appear that at some time prior to the trial there had been an investigation made and examination held by the deputy fire marshal concerning the same, and testimony given by certain of the plaintiffs' witnesses on such examination was referred to and used on the trial by defendants.

The proofs of loss sent on behalf of the plaintiffs to the respective defendants on December 1st were retained by them and no specific objection made before trial that there had been a failure to comply with the provisions of the subsection just above quoted.

The complaint and answers in the several actions were substantially the same except as to dates and amounts, and each answer contained the following clause:

"Defendant denies that the plaintiffs duly fulfilled all the conditions of said insurance; but admits that Menting &

Hickey, sixty days before the bringing of the action, gave notice to defendant of said fire and served, in form, proofs of loss, and denies that said proofs of loss were as required by said policy."

After the usual respective motions by the parties after verdict the court directed a judgment for the plaintiffs for the amount assessed by the jury, and from judgment entered in accordance therewith the defendants have appealed.

For the appellants there was a brief by *Martin, Martin & Martin* of Green Bay, and oral argument by *P. H. Martin* and *John E. Martin.*

For the respondents there was a brief by *Goodrick & Morson* of Antigo, and oral argument by *H. F. Morson* and *E. J. Goodrick.*

ESCHWEILER, J. The serious question presented in this case is whether or not the clause in sub. 5, sec. 1946*i*, Stats., quoted above, to the effect that "No proof of loss under any policy of insurance shall be made until such notice has been given by or in behalf of such occupant or owner," is of such force and vigor that a failure to give such notice shall deprive an insured, otherwise entitled to recover for a fire loss, from any right to recover.

This subsection in question was created by ch. 489, Laws 1913. No amendments have been made since then, nor has it been presented for consideration to this court. No specific penalty was therein or elsewhere provided for any violation of this section nor does any provision therein declare a forfeiture of any rights of any such owner or occupant for a violation thereof, unless such forfeiture can be read from the language last above quoted.

Under the provisions of the Wisconsin standard policy of fire insurance covering the policies included in this action, provision is made for rendering to the insurance company by the insured, within sixty days after the fire, a proof of loss

signed and sworn to by the insured, stating among other things the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all the others in the property, etc., and that no suit or action on such policy for the recovery of any claim shall be sustainable in any court of law or equity unless there shall have been compliance with all the requirements of the policy, nor unless commenced within twelve months next after the fire. Such standard policy has been held to create rights and obligations of a statutory nature between parties thereto, besides the mere contractual relationship. *Temple v. Niagara F. Ins. Co.* 109 Wis. 372, 85 N. W. 361; *Rosenthal v. Ins. Co. of N. A.* 158 Wis. 550, 149 N. W. 155.

Upon this sub. 5, sec. 1946*i*, Stats., and the statutory effect given to the provisions of the Wisconsin standard policies, it is earnestly contended by the defendants that as it appears in this case that no notice was given by either owner or occupant of the premises upon which the fire occurred to the state fire marshal, what would otherwise have been deemed proper proofs of loss under the policy were mere nullities and could be absolutely disregarded, and that until such notice had been given there was an absolute want of any foundation for the commencement of suit upon the policies. It is further urged that, inasmuch as the time has now expired within which any suit could be brought under the terms of the policy, the defendants are entitled to a dismissal of the actions upon the merits.

It is apparent that the evident purpose of this statute is a part of the public policy of the state to minimize the fire losses caused by the careless as well as the incendiary, and that it was not passed merely with a view of furnishing insurance companies with a means of avoiding what would otherwise be a liability upon their contracts of insurance.

We do not, however, feel justified from a consideration of this statute to hold that it was intended to have such a

drastic and wide-sweeping effect upon contract rights as would be necessary to accord to it in order to sustain the defendants' contention. We are unable to find the clear and unmistakable expression of such intent that should be present to warrant us in holding that such a forfeiture was intended. Such a construction would necessitate the same penalty of total loss of secured contract rights of insurance upon one who failed to give such notice to a public official through the ignorance or carelessness of himself, his agent, or the occupant of his premises, as upon the incendiary who also failed for fear of incriminating himself if giving a true notice, or of adding the crime of perjury to that of arson if giving a false or misleading notice. The statute requires that notice shall be given immediately, with no definite designation of the time within which such notice shall be given in order to comply with it other than might be inferred from the provisions found in the standard policy requiring proofs of loss to be given within sixty days after the occurrence of a fire. To construe this statute as providing for an absolute forfeiture might well mean that he who gave the notice within twenty-four hours after the fire had complied therewith and saved his insurance, while he who gave it forty-eight hours thereafter had not given it immediately and had therefore lost his insurance. It makes no exceptions. Its drastic provision, if so construed, could not be avoided even where the insured might know that the proper public officials had learned from the public press or other sources of the fire, or even where the fire marshal had immediately acted upon such outside information and conducted an investigation or the statutory examination of the insured.

Moreover, the statute does not provide that in event of default in giving notice no recovery shall be had upon any policy of insurance, but that no proofs of loss shall be made until such notice has been given. There is this substantial difference between the two: the former expression might

well be construed as a legislative declaration that the courts should not permit an insurer to recover at all, while the other refers to a provision that may be nevertheless waived by the insurer by acts or declarations. *Kutschenreuter v. Providence Washington Ins. Co.* 164 Wis. 63, 159 N. W. 552.

While it is true that the effect of this decision may be to make the language of the statute here involved more in the nature of an exhortation to the insurer and an admonition as to what he ought to do than a mandate so imperative that a failure to comply absolutely sweeps out of existence substantial contract rights secured to him for valuable consideration and thereby most certainly impressing upon him the importance of obeying the letter of the law, we are nevertheless inclined to the milder of the two constructions.

The defendants accepted and retained the proofs of loss, and by the provisions in the answers set forth in the statement herein deny that the plaintiff had fulfilled all the conditions of said insurance and deny that the proofs of loss were as required by said policy. We do not consider this to be a sufficient notice to plaintiffs that the defendants were relying upon any such statutory provision as is now asserted. The contract of insurance between the parties did not by its terms require the giving of this notice to the fire marshal. It was required only by virtue of the independent statute. A denial, therefore, of the fulfilling by the insured of all the conditions of the policy or that the proofs of loss were as required by the policy is not a plea that there had been a failure to give this statutory notice. That although a copy of such statute and apparently an approved form of notice to be used was attached to the policies, yet it was additional to, outside of, and not made a part of the contract between the parties.

At the time the suits were commenced this failure to give notice to the fire marshal, if effective to the defendants at all, would have done no more than abate the suits because prematurely brought. It did not go to their merits and therefore

it must be raised by special pleading. *Dutcher v. Dutcher,* 39 Wis. 651, 660.

We have considered all of the other questions presented by defendants on this appeal. We do not consider it necessary to discuss them or to say any more than that none of them are well taken.

By the Court.—Judgment affirmed.

ALLEN, Appellant, vs. WOLF RIVER LUMBER COMPANY, Respondent.

SAME, Respondent, vs. SAME, Appellant.

April 3—April 29, 1919.

Sales: Construction of contract: Correspondence: Quantity of goods: Performance: Delivery: Designated place: Title: Breach: Damages: Contracts: Offer: Acceptance.

1. A sales contract entered into by correspondence will be construed from the whole of the correspondence.
2. Where the seller wrote to the buyer stating that he was going to peel about 1,000 cords of bark during the year and offering to sell such amount to the buyer, a contract entered into, after considerable correspondence as to price, by the buyer's acceptance of the seller's offer of "our peel this year" at a stipulated price, was a contract for 1,000 cords.
3. One who makes a proposal to another to be answered by return mail, in the absence of a revocation, holds himself ready and willing to abide by it until acceptance or rejection can reach him by return mail.
4. Where the seller's offer of goods at a stipulated price at any point having a certain rate is accepted, the seller does not complete the contract and is not entitled to the price until the goods are delivered at a point having such rate, under sub. 5, sec. 1684*t*—19, Stats.
5. Unless provision to the contrary is made, title passes with delivery.
6. Where, under a contract for goods to be delivered at any point having a certain rate, the buyer, pursuant to a request for shipping directions, named a point having such rate, such point was the place of delivery.

7. Where the time of delivery was not specified, the buyer's measure of damages under sub. 3, sec. 1684*t*—67, Stats., upon the seller's failure to deliver, was the difference between the contract price and the market price at the place of delivery at the time of the seller's refusal to deliver.

APPEALS from a judgment of the municipal court of Langlade county: T. W. HOGAN, Judge. *Modified and affirmed.*

Action to recover damages for breach of a contract to deliver certain tan-bark sold to plaintiff.

June 25, 1915, defendant wrote plaintiff at Buffalo, New York, as follows:

"Your card of the 23d received. I am peeling about a thousand cords of bark this year; have now between 600 and 700 cords peeled from the tree. The most of this will not be shipped until sleighing comes along about the first of the year. . . . I will sell you the 500 or 1,000 cords of bark, 2,240 pounds to the cord, for $13.50 f. o. b. Buffalo, but understand a good deal cannot be delivered until winter, but if you wanted 200 or 300 cords before, I could arrange to ship it to you."

June 28th plaintiff wrote defendant at Antigo, Wisconsin, as follows:

"Replying to your esteemed favor of the 25th. Would like very much to have the 1,000 cords bark, but the price is too high for me. If you could make that price $12 per 2,240 pounds, I would be inclined to place it, though we are buying our local bark for $10.50 to $11 per ton. . . ."

June 30, 1915, defendant replied:

"Now I will tell you what I will do. I will split the difference with you and call it $12.75 f. o. b. Buffalo, 2,240 pounds to the cord."

In reply plaintiff wrote under the date of July 2, 1915:

"I have done my best to get the price from tanners to meet your price of $12.75, Rochester, New York, but can't do it. They claim extracts are cheaper and they use them. Per-

haps another season I can use some bark from you, but $12—2,240 pounds Deld Rochester rate is all our market will stand this season."

July 21, 1915, defendant wrote plaintiff as follows:

"In regard to our hemlock bark, inasmuch as you offer us $12 per cord delivered on a Rochester rate of freight, if you cannot pay us more we are inclined to accept your price of $12 per cord of 2,240 pounds to the cord delivered on a Rochester rate of freight, for our peel this year. Please let us know how to bill this bark. I may ship a car or two in a few days, and then the balance will come out when we have snow. If this is satisfactory let us know by return mail."

July 23d plaintiff replied:

"Replying to yours 21st. Confirm purchase of your bark at $12 per 2,240 pounds delivered Rochester rate. You may ship the cars now ready to *H. C. Allen,* Olean, New York, Erie delivery. Send papers to me here and I will look out for cars when they arrive. Would like as much of this bark shipped promptly as possible. Kindly advise me about the amount to be shipped now and amount for winter shipment, and oblige. If you can ship 300 cords now, I would like it very much."

In reply to this defendant wrote plaintiff on July 24, 1915:

"On account of not hearing from you, I, today, sold what bark we had peeled to Grand Rapids, Michigan, people, getting $6.75 f. o. b. cars Monico for same. As I wanted to dispose of what we had as I stopped peeling on account of the low prices. As shipping it to Buffalo the rate is 21c and to Syracuse the rate is 26c so it would leave me a loss, so when I got my price I sold it all."

Then follow a number of letters in which plaintiff insists he is entitled to the 1,000 cords of bark and defendant offers 200 cords of bark at a different price and upon the payment of $1,000 down. The new terms are not accepted and bark is not shipped to plaintiff.

The defendant's principal place of business was at Antigo, Wisconsin, and plaintiff's place of business was in Buffalo.

New York. The tan-bark was located in the woods near Monico, Wisconsin, about forty miles north of Antigo. The evidence showed that defendant peeled only 317 cords during 1915. A jury was waived, and the court found that the place of delivery of the bark was Monico, Wisconsin, that the quantity sold was 317 cords, the peel of that year, plus 200 cords which defendant bought at Mattoon, Wisconsin; that plaintiff's damage was the difference between the contract price at Monico, which the court found was the Rochester delivery price of $12 per cord, less the freight rate of $6.16 per cord from Monico and $5.82 from Mattoon, and the price of bark at Monico and Mattoon found to be $6.25 per cord of 2,240 pounds. This made a loss of forty-one cents per cord on the 317 cords and a loss of seven cents per cord on the 200 cords bought at Mattoon, in all a loss of $143.97, for which amount it awarded judgment to plaintiff. Both parties appealed.

For the plaintiff the cause was submitted on the briefs of *Henry Hay* of Antigo.

For the defendant there was a brief by *E. J. Goodrick*, attorney, and *H. F. Morson*, of counsel, both of Antigo, and oral argument by *Mr. Goodrick*.

VINJE, J. Plaintiff appealed because he claimed the amount of bark sold was 1,000 cords; the place of delivery was Olean, New York; and the measure of damages the difference between the contract price and the market price of bark at Olean at the time of the breach. The defendant appealed because it claimed the amount of bark sold was 317 cords and did not include the 200 cords bought at Mattoon; the place of delivery was Antigo; and the measure of damages the difference between $12, less $5.82, the freight rate from Antigo, and the market price at Antigo, which it claimed did not exceed $6.25 per cord. It will thus be seen

that the amount of bark sold, the place of delivery, and consequently the measure of damages, are in dispute.

As to the amount of bark sold the defendant's claim is that its letter of July 21st offering to sell its peel of this year and the acceptance of that in plaintiff's letter of July 23d constitutes the contract between the parties. The trial court adopted this view, for it excluded from evidence the letters of June 25th and of July 2d. It is clear that the whole correspondence relating to this transaction is admissible in evidence to show what the contract was, and the letters mentioned were improperly excluded. The contract must be read out of the whole correspondence, since every letter therein related to the same matter and no such interval elapsed between any as to warrant an inference that the parties considered they were starting anew to make a contract.

From the whole correspondence we reach the conclusion that defendant offered to sell 1,000 cords and plaintiff accepted that offer. If so, that made a contract for the sale of 1,000 cords. Our conclusion is based upon the fact that defendant in its first letter stated it was going to peel about 1,000 cords that year and had already between 600 and 700 cords peeled; that it offered to sell the 500 or 1,000 cords; that plaintiff replied he would like to have the 1,000 cords if the price was right. After that the correspondence was all about the quality of the bark and the price. So when defendant on July 21st accepted plaintiff's price for this year's peel, it knew plaintiff understood it was to be at least 1,000 cords, and it must be held to have made an offer of that amount. This is confirmed by the fact that, in letters passing between the parties subsequent to the breach, plaintiff claims the quantity was 1,000 cords and defendant does not deny such claim, though it offers him only 200 cords upon different terms. It is also in evidence that plaintiff, immediately after accepting the offer from defendant, resold 1,000

cords to Eastern tanners in the belief that such was the amount he had bought. This evidence, of course, bears only upon the question of what he understood the contract to be, and could not bind defendant if he made no offer of 1,000 cords. But it is clear from the evidence that he did make a specific offer of 1,000 cords, which plaintiff said he wanted if the price was right. It is also uncontradicted that defendant represented that its peel for that year would be about 1,000 cords. Hence from the correspondence had, when it made an offer of this year's peel it meant 1,000 cords.

The breach of contract by the defendant is clearly established. In its letter of July 21st, accepting plaintiff's terms, it said: "If this is satisfactory, let us know by return mail." This authorized plaintiff to accept by return mail and he did so accept. A party who makes a proposal to another to be answered by return mail, in the absence of a revocation, holds himself ready and willing to abide by it until acceptance or rejection can reach him by return mail. 6 Ruling Case Law, 611. Here the defendant did not wait until a letter could reach him from Buffalo by return mail, but sold the bark on the 24th to another party. This constituted a breach of his offer.

Plaintiff's unsuccessful effort to induce defendant to perform cannot be considered tantamount to keeping the contract alive for the benefit of both parties. Plaintiff insisted upon performance or full damages for the breach. He did not secure performance, so he is relegated to his only other remedy, damages.

We think the trial court erred in finding that the place of delivery was at Monico, Wisconsin. Defendant in his first letter offered to sell the bark f. o. b. Buffalo for $13.50 per cord. This price was not satisfactory to plaintiff. He suggests he would pay $12 per cord in his letter of June 28th, but in his letter of July 2d he says $12 per cord "Deld

Rochester rate" is all the market will stand this season, and it is this offer that the defendant accepts. He therefore agrees to deliver bark at any point having a Rochester rate for $12 per cord. His contract is not complete till he makes such delivery. He must pay the freight and deliver before he can demand his $12 per cord. Nothing is said about any price per cord in Wisconsin. The price is fixed as of the place of delivery. In such a case sub. 5, sec. 1684*t*—19, Stats., applies. It provides :

"If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

See, also, *McLaughlin v. Marston,* 78 Wis. 670, 47 N. W. 1058, and *Southern F. & G. Co. v. McGeehan,* 144 Wis. 130, 128 N. W. 879. Here the contract required the seller to ship to a designated place and to pay the freight to such place. Unless provision to the contrary is made, title passes with delivery. *Gehl v. Peycke Bros. C. Co.* 158 Wis. 494, 149 N. W. 275. Here delivery was to be made at a place having a Rochester rate designated by plaintiff. Defendant asked for shipping directions and plaintiff named Olean, New York, a point having a Rochester rate. That then was the place of delivery.

Plaintiff's measure of damages was the difference between the contract price and the market price of the bark at the place of delivery and at the time of the breach. Sub. 3, sec. 1684*t*—67, Stats.; *Southern F. & G. Co. v. McGeehan,* 144 Wis. 130, 128 N. W. 879; *Pope M. Co. v. Sadek,* 149 Wis. 394, 135 N. W. 851. No specified times of delivery are contained in the letters. It was contemplated that the major part of the bark could not be shipped till it could be hauled to

the railroad on sleighs. Therefore, since no time was fixed for delivery, the time of refusal governs as to date of market price measuring damages. *Ibid.*

The evidence shows that the market price of bark at Olean, New York, at the time of the breach was $13.44 per cord of 2,240 pounds each. Plaintiff's measure of damages, therefore, was the difference between the contract price of $12 per cord and the market price of $13.44 per cord, or $1.44 per cord. On 1,000 cords this amounts to $1,440, for which sum, with interest thereon from July 24, 1915, at six per cent. per annum, he is entitled to judgment. *Vogt v. Schienebeck,* 122 Wis. 491, 100 N. W. 820; *Pope M. Co. v. Sadek,* 149 Wis. 394, 135 N. W. 851.

By the Court.—The judgment is modified by inserting in lieu of the words "one hundred forty-three and 97-100 dollars ($143.97), with interest from the 1st day of September, 1915, which interest amounts to seventeen and 84-100 dollars ($17.84), in all the sum of one hundred sixty-one and 81-100 dollars ($161.81)," the following: "fourteen hundred and forty dollars, with interest thereon at six per cent. from July 24, 1915, which interest amounts to $218.40, in all the sum of sixteen hundred and fifty-eight and 40-100 dollars," and by inserting in lieu of the words "two hundred twenty-three and 61-100 dollars ($223.61)," at the end of the judgment, the words "seventeen hundred twenty and 21-100 dollars ($1,720.21)," and as so modified is affirmed, with costs to the plaintiff.

WILLIAMS, Administratrix, Appellant, vs. DULUTH STREET RAILWAY COMPANY, Respondent.

April 4—April 29, 1919.

Street railways: Injuries on track: Negligence: Contributory negligence: Omission to promulgate rules for management of cars: Negligence of motorman: Emergency: Opinion evidence: Failure to strike out: Witnesses: Reference to memorandum: Production: Appeal: Harmless error: Remarks by court: Request for instruction already given: Curative instruction.

1. In an action against a street railway company for negligently causing the death of a pedestrian while crossing its tracks, the evidence is *held* to sustain findings that the motorman was not guilty of negligence in the operation of the car which struck decedent and that decedent was negligent.
2. Evidence that the street-car conductor, a few minutes after the collision, stated that, since everything needful had been done for the injured pedestrian, in order to keep the car on time those wishing to go to destination might start, was properly excluded as not tending to show that the car was running at a high rate of speed.
3. The opinion of a witness, given while testifying as to the speed of the car, that the motorman used very good judgment, is *held* improper.
4. Where, on motion to strike such testimony and admonish the witness, the court told him to give facts and not conclusions but did not direct the striking of the objectionable testimony, the omission was not prejudicial error.
5. Mere reference by defendant's counsel to a memorandum of a witness's statement after the accident did not require its production, where the witness did not use it to enable him to testify.
6. Omission of the company to promulgate rules for the management of its cars in snowy weather had no bearing on the legal responsibility for its alleged negligence through its motorman in killing a pedestrian on its tracks in a snowstorm.
7. A street-car motorman, observing a pedestrian in danger, must use all reasonable care to avoid striking him; but if a sudden emergency arises without his negligence and there are different ways to avoid collision, he is not negligent because he fails to select the best course.

8. Any misleading tendency of the court's remarks, in presence of the jury, that if the railway company was negligent it was in failing to operate its car properly up to the time the pedestrian was discovered, etc., is *held* cured by an instruction.
9. The refusal of the trial court to give plaintiff's requested instruction on a point on which the jury was properly and fully instructed was not error.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This action was brought by *Louisa Williams,* as administratrix of the estate of Louis Williams, to recover damages for the death of Louis Williams through alleged negligence of the *Duluth Street Railway Company.*

On and prior to March 13, 1917, Louis Williams, a resident of the city of Superior, was employed at a shipbuilding plant located on Rice's Point in the city of Duluth, Minnesota. The defendant owned and operated a double-track street railway on Garfield avenue in the city of Duluth, which line was the connecting line between the cities of Superior and Duluth. Garfield avenue runs north and south; the cars going to Superior run south on the west track. The Bay of Superior lies to the east of Garfield avenue, and the shipyard at which deceased was employed is located on the water front about 1,000 feet from the bottom of the approach of a viaduct built at the north end of Garfield avenue over a number of railroad tracks, with an approach leading down to the level of Garfield avenue proper.

A severe blizzard was raging in the cities of Duluth and Superior on March 13, 1917, the day Williams was killed. Williams left the shipyard at 4:30 o'clock in the afternoon and walked to Garfield avenue for the purpose of taking a street car to his home in Superior. In order to take the car it was necessary for him to cross both the street railway tracks. While crossing the west or south-bound track he was struck by a street car, causing injuries of which he died March 22, 1917. The plaintiff alleges that the street car

which struck Williams was going at a rate of thirty miles an hour; that the snow so filled the air that an object could not be seen more than twenty feet away; that the car was run negligently and carelessly, the motorman neglecting to ring the bell or sound the gong on the car; and that no precaution was taken by the defendant to avoid or prevent injury to deceased or to give him warning of the danger in which he was placed.

The defendant denies that the accident occurred through any negligence on its part, but alleges that the accident was caused by the negligence of the deceased.

The case was tried before the court and a jury. In a special verdict the jury found that Louis Williams was fatally injured by a collision with one of the defendant's street cars; that the motorman did not fail to exercise ordinary care in the operation of the street car; that Louis Williams was guilty of want of ordinary care proximately contributing to produce his injury.

The plaintiff's motion to set aside the verdict and grant a new trial was denied and judgment was entered dismissing the complaint on its merits and awarding the defendant its costs and disbursements. Appeal is taken from this judgment.

For the appellant there was a brief by *Hanitch & Hartley* of Superior, and oral argument by *Louis Hanitch* and *Clarence J. Hartley.*

C. R. Fridley of Superior, for the respondent.

SIEBECKER, J. It is contended that the court erred in refusing to grant plaintiff a new trial. The jury found that the motorman was not guilty of actionable negligence in the operation of the car which collided with the decedent, Louis Williams. The evidence adduced on this point justified the conclusion that the car was being operated at a speed from eight to ten miles per hour; that the gong and whistle signals were given as it proceeded down the viaduct of Garfield ave-

nue; that the brakes were applied and were in operation; that the motorman kept a lookout for pedestrians; that he could see persons from twenty-five to thirty feet from the car; that Williams was running and attempting to cross the street-car tracks in front of the car; that the motorman immediately, when he saw Williams, put on the reverse, but that he could not stop the car before it collided with Williams and injured him. In the light of these facts, the condition of the tracks, the decline of the street over the viaduct, and the weather, it is clear that it cannot be said that the verdict is not supported by the evidence. The plaintiff contends that the court prejudicially erred in its denial of a motion to grant a new trial upon the following grounds:

(1) It is urged that the exclusion of the evidence offered to show that the conductor, within a few minutes after the collision, stated in effect that since everything needful had been done for Williams, that "in order to keep the car on time" those wishing to go to Superior might as well start, was prejudicial error because this statement significantly tended to show that the car was being run at a high speed under adverse weather conditions. This ruling was not prejudicial upon the ground that the evidence has no probative effect on the point suggested.

(2) The witness Rohow, when testifying to the speed of the car, stated: "the motorman used very good judgment, in my opinion." Plaintiff's counsel moved this be stricken and that the witness be admonished to state only facts. The court addressed the witness: "Give the facts and not your conclusions," but did not direct the objectionable part to be stricken out. Though the witness's opinion was improper, the omission to have it expunged cannot be treated as prejudicial error, since the court conveyed to the jury the idea that facts only and not conclusions were to be treated as evidence in the case. This witness also testified on direct examination that the collision was almost instantaneous with the

sounding of the whistle. Defendant's counsel thereupon inquired whether he made a statement of the occurrence after the accident. The witness answered affirmatively and then this question was propounded: "Do you remember that in that statement you said the whistle was blowing about half a car length before you struck him?" Objection was made to the question upon the ground that it was in the nature of cross-examining the witness. The court declared that the witness's memory could be refreshed properly in this way and that the witness might inspect a memorandum for that purpose, but no memorandum was submitted to or used by the witness. Plaintiff's counsel insisted on its production for his inspection. This request was refused. It is apparent that the right of the cross-examiner to inspect and use a memorandum to test a witness's credibility and the fact that the witness's memory could not be refreshed has no application to the situation here. Mere reference to a memorandum by counsel does not require its production so long as the witness does not use it to enable him to testify.

(3) Plaintiff requested that the following inquiry be submitted in the special verdict, which the court refused: "Did the defendant, at and prior to the time Louis Williams was struck, exercise ordinary care in the operation of the street car?" The following question was submitted: "Did the motorman, prior to the collision with said Williams, fail to exercise ordinary care in the operation of the street car?" It is urged that the question propounded by the court did not include the issue as to defendant's alleged negligence, because it omitted to include the duty of defendant to promulgate rules for the proper conduct of its business under weather conditions as they existed on the day of the accident. The argument is made that the usual mode of running the street cars is not reasonable care for conducting the business under the adverse weather conditions that existed on the day in question, and hence the defendant should have in-

structed employees by promulgation of rules how to operate the cars in bad weather. In discharging its duties and obligations to persons other than its agents, servants, and employees, the defendant must act through its agents, servants, and employees, and their acts are the acts of the company, and so in the instant case the motorman was the representative of the defendant in the running of the car which collided with Williams; his acts are its acts for the purposes of this case, and his acts can be the only basis on which to predicate negligence. Defendant might promulgate innumerable rules for the instruction of its servants how to run its cars in the variant conditions of weather, yet such rules could in no way control on an inquiry whether or not the defendant was guilty of running its cars in a negligent manner as regards persons not in its employ. It is manifest that omission to promulgate such rules has no bearing on defendant's legal responsibility for the alleged negligence in the accident to Williams.

(4) It is urged that the court's remarks in presence of the jury to the effect that if defendant were negligent it was in failing to operate the car properly up to the time Williams was discovered and probably the evidence did not show negligence after the motorman discovered Williams because no one claimed that the car could have been stopped in less than 125 feet, were improper. This observation was made in response to the argument of plaintiff's counsel in summing up the case to the jury, that if speed had been slackened Williams would not have been struck. The evidence tends to show that the motorman had the air on the car when he discovered Williams, that he immediately released the air, reversed and put sand on the rail to stop the car, and that this is an efficient way of stopping quickly. The court instructed the jury that it was the motorman's duty, when he saw Williams, to use all reasonable care to avoid colliding with Williams, but that if a sudden emergency arose without his negligence and there were different ways for him to

adopt in order to avoid colliding with Williams, he was not negligent if he selected a course which may not have been the best. This instruction states the proposition involved in the court's remarks and applied the correct principle to the evidence. Any misleading remarks of the court were thus effectively corrected by this instruction.

The jury was properly and fully instructed on this issue of defendant's negligence, and hence the refusal of the court to give plaintiff's requested instruction on this point was not error.

We find no prejudicial error in the record affecting the verdict as to defendant's negligence. The defendant not being negligent, it follows that plaintiff has no cause of action against the defendant. This state of the case renders it unnecessary to discuss the other question presented by the appellant.

By the Court.—The judgment appealed from is affirmed.

LANEY, Respondent, vs. RICARDO and another, Appellants.

April 5—April 29, 1919.

Vendor and purchaser: Making of contract: Meeting of minds: Option: Ratification of new terms: Rejection of contract: Trial: Recital of evidence in findings of fact.

1. Findings of fact should not be a recital of the evidence or a history of the litigation, but should cover only the ultimate issues raised.
2. The minds of the parties to a contract must meet upon the essential contents thereof.
3. Where the purchaser of land wired acceptance of an offer by the vendor's agent of an option for a certain period at a certain price, but sent a written contract providing that the amount paid for the option be deducted from the purchase price and warranting the agent's authority to give the option—terms which the vendor's agent had not agreed to,—there was no contract, the minds of the parties not having met upon essential terms.

4. The vendor's agent, by notifying another agent having the property listed that he had granted the option, did not assent to new terms, where he had not received the contract stating such terms when notice was given.
5. The vendor's failure to notify the purchaser of the rejection of the contract because it contained terms not agreed to, was no ratification of the contract, where the bank to which it was sent was told of the refusal to sign and of the nonacceptance of the contract.
6. The vendor's agent did not ratify the option sent by the purchaser for signature but containing terms to which the agent had not agreed, by writing another agent having the land listed that the deal was apparently going through or by writing the purchaser's agent that he was getting the option "altered a little bit," for at such time the vendor's agent, in view of the purchaser's telegram accepting his offer, thought the vendor would consent to eliminating objections so as to make the contract correspond with his offer.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

Action to recover damages for breach of an alleged contract to sell certain lots in the city of Superior. One F. B. Pemberton of Victoria, British Columbia, acted as agent for the defendants, and it is admitted that he had authority from them to give an option for the sale of the lots. August 8, 1916, he wrote one A. R. Cann of Superior asking if he could assist in the sale of the lots so as to net *Ricardo* $1,500 for his equity. August 24th Cann replies that he thinks he can and asks for an exclusive sale. September 8th Pemberton writes that one E. A. Arnold has the sale of them also. January 1, 1917, Cann wires Pemberton, "Have accepted, subject to your approval fifty dollars option money on Ricardo Belknap lots sale price to be on basis of fifteen hundred dollars for his equity as per your letter of August 8th said option to be for a period of ninety days." January 2d Pemberton wrote Cann, "It is hardly fair to expect us to give as long an option as ninety days, but we do not mind giving sixty days' option for the $50 if you think sale likely to go

through." He also wired on the same date, "Will give option sixty days not ninety terms your lettergram." In reply Cann the same day wired, "Will give seventy-five dollars option ninety days," to which Pemberton the same day replied by wire, "Will give option ninety days one hundred dollars." January 5, 1917, Cann wired Pemberton, "Have accepted one hundred dollars as option money on Ricardo Belknap lots as per your telegram we to pay fifteen hundred dollars for equity in lots am forwarding option for signature with draft for one hundred dollars to Canadian Bank of Commerce." This message was received by Pemberton January 6th. The written form of option naming plaintiff as purchaser was sent to the bank with instructions to deliver the draft for $100 to Pemberton upon his signing the option. Among other things the written option provided that the $100 paid for the option should be deducted from the purchase price of $1,500 for the equity, and it warranted that Pemberton had the right to give the option. When the option was presented to Pemberton on January 15th or 16th for signature he refused to sign it, and requested the bank to hold it and the draft till *Laney* could be heard from. The bank held both till February 19, 1917, when upon plaintiff's request it returned them. January 9, 1917, in reply to an offer from E. A. Arnold, Pemberton wrote Arnold, "Unfortunately I have accepted an offer to bond the property for three months. In case anything falls through with regard to this, I will at once let you know," and on January 18, 1917, he again wrote Arnold, "Apparently the deal with Mr. Cann is going through so we will not be able to avail ourselves of your offer." On the 19th Pemberton is advised by *Laney* that Arnold has recorded a deed on the lots in question executed by defendants to Belmont Company as grantee. This turns out to be an old deed in the possession of Arnold which it was expected might be used in a former deal that had fallen through. Arnold changed the dates in the deed

and recorded it without any authority on the part of the defendants or of Pemberton. The deed was afterwards set aside in an action brought for that purpose. On January 20, 1917, Pemberton writes *Laney,* among other things, the following: "I received the option from the bank and was getting it altered a little bit and would have sent it off today." Letters and telegrams of inquiry and explanation follow between Pemberton and *Laney.* The latter insists that the deal be closed as per written option sent, and he forwards deeds for that purpose. Pemberton refused to deal with *Laney,* and about the 1st of February, 1917, accepted an offer from Arnold and the lots were conveyed to Arnold's client. A jury having been waived, the trial court found that Pemberton had entered into a valid contract to sell as per written option forwarded to the bank, and assessed plaintiff's damages in the sum of $4,791.37, with interest and costs. From a judgment entered accordingly the defendants appealed.

For the appellants there was a brief by *Luse, Powell & Luse* of Superior, and oral argument by *C. Z. Luse* and *L. K. Luse.*

For the respondent there was a brief by *Hanitch & Hartley* of Superior, and oral argument by *Louis Hanitch* and *Clarence J. Hartley.*

VINJE, J. The defendants contend (a) that the negotiations did not ripen into a contract; (b) that no note or memorandum signed by their agent was ever made to satisfy the statute of frauds; (c) that plaintiff, owing to his relations to Cann, is in no position to claim any benefit under a contract with the defendants; and (d) error in assessing damages.

The trial court made sixty-four so-called findings of fact covering forty-four printed pages. The first fifty-five findings are mere recitals of evidence, and most of the balance

except finding 58, finding that a contract was made, and finding 63, covering plaintiff's damages, are a mixture of recitals of evidence, arguments, and conclusions. Only two issues arose, namely: first, did the parties make a contract, and, if so, what were its terms; and second, if a contract was made what were plaintiff's damages. The breach was admitted.

This court has so frequently reminded trial judges that findings of fact should not be a recital of the evidence in the case, or a history of the litigation, but should cover only the ultimate issues raised by the evidence, that further advertence thereto seems superfluous. But the present case is so flagrant a violation of the rule that we cannot forbear to again admonish trial judges against like or similar infractions thereof.

The substance of all the correspondence between *Laney* and Pemberton and Cann and Pemberton up to the latter's refusal to sign the written option, which was first presented to him by the bank either January 15th or 16th, is set out in the statement of facts. From such correspondence and the testimony in the case three things clearly affirmatively appear: first, plaintiff was to pay $100 for an option for ninety days; second, he was to pay *Ricardo* $1,500 for his equity if he exercised his option within that time; and third, it was contemplated by plaintiff and Cann that a written option was to be signed by Pemberton. It also negatively appears that there was no thought on the part of Pemberton that he should "warrant that he has a good right and authority for this option," which clause was contained in the draft sent and which he refused to sign partly for that reason.

It is a familiar principle in the law of contracts that the minds of the parties thereto must meet upon the essential contents of the contract. Here they never so met. Pemberton never agreed to sell for $1,500 less the $100 paid for the option. His offer was to sell for $1,500 plus the $100 paid for the option. This offer plaintiff never accepted.

And while the parties stipulated upon the trial that Pemberton had authority to give the option, he did not offer to warrant that he had authority, and from the evidence it appears he was unwilling to give such warranty. The fact that he wrote Arnold under date of January 9th that he had bonded the property for three months does not show an assent to the option sent him, for that was not seen by him till January 16th or 17th. At the time he made that statement he no doubt relied upon the truth of Cann's telegram of January 5th that he had accepted $100 as option money on terms stated. Pemberton had a right to assume that the written option to be sent would embody the essential terms of the offer made, and not make counter terms as it did. That plaintiff and Cann understood that Pemberton alone had the right to give an option appears in all the correspondence and is made clear by the wire of January 5th where it stated option is forwarded for signature.

The trial court also inferentially finds that Pemberton, by not making specific and prompt objections to the option sent, ratified it. This view is untenable, because he distinctly told the bank he could not sign or use the form of option sent when it was first presented to him. The bank was plaintiff's agent and it was its duty to inform him of Pemberton's refusal to sign.

Nor is it strange that Pemberton should have written Arnold on the 18th day of January, a day or two after the option was first presented to him, that "apparently the deal with Mr. Cann is going through," for he then no doubt thought that plaintiff would consent to eliminate the objectionable features of the option and make it correspond to the offer made. So, also, his expression in his letter to *Laney* that he was getting the option "altered a little bit" and would have it sent off today, January 20th, does not show a ratification of the option sent. On the contrary it shows disapproval or he would not have altered it a little bit. He

must have deemed the alterations of some importance or he would not have made them, but would have signed the option as sent. This letter was written the day after plaintiff informed Pemberton of the record of a deed by Arnold. From there on everything was held in abeyance awaiting an explanation. Owing to the distance the parties lived apart and the difficulty Pemberton encountered in getting definite information, it is not strange that almost another month should elapse before he told plaintiff definitely that the deal was off.

Counsel for defendants call attention to a number of matters in which the written option differed from Pemberton's offer in addition to the amount of the purchase price and Pemberton's warrant of power, but we prefer to base our decision upon the fact alone that Pemberton was under no obligation to accept $100 less for the equity in the property than he offered it for, and that the counter proposition to pay only $1,400 for such equity was never accepted or ratified by him. It follows that the trial court erred in finding that a valid contract for the sale of the property had been entered into by the parties either expressly or by ratification. The result reached upon this point renders it needless to discuss defendants' other assignments of error.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for defendants dismissing the action upon the merits.

KELLY, Administratrix, Respondent, vs. FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, Appellant.

April 5—April 29, 1919.

Insurance: Condition subsequent: Military service: Construction of policy: Limitation of liability: Construction against insurer.

1. A provision in a life insurance policy limiting the liability of the insurer to the return of premiums if the insured engaged in military service and died as a result thereof, directly or indirectly, does not limit liability for all deaths in the military service, but only for such as are due to some cause peculiar to the service, and the beneficiary can recover the full amount for the death of the insured in a motorcycle accident while he was in the military service, far behind the firing lines.
2. All conditions or exceptions limiting the liability of an insurer must be construed most strongly against the insurer, who prepared the contract and for whose benefit they were inserted.

APPEAL from an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Demurrer. It appears from the complaint that on March 24, 1916, the defendant issued to the plaintiff's intestate a certain policy of insurance upon the life of said intestate in the sum of $10,000. The following provisions were contained in the application, which formed a part of the policy:

"*Military or naval service or work in connection with warfare.* If the insured shall, within two years from date of this policy, engage in any military or naval service, or in any work as a civilian in any capacity whatsoever in connection with actual warfare, and shall die within two years of the date of this policy as a result, directly or indirectly, of engaging in such service or work, the liability of the company under this policy shall be limited to the return of the premiums paid, without interest."

In the summer of 1917 plaintiff's intestate, one John George Kelly, enlisted in the military forces of the United States, was thereafter transferred to France, and while sta-

tioned at a point more than 100 miles from the zone of actual warfare and a like distance from any territory occupied or invaded by the enemy, and while as a part of his military duties being engaged in supervising the construction and operation of sawmills, was accidentally killed while riding a motorcycle. While in the discharge of his duties and while going from one mill to another his motorcycle skidded, throwing him against a tree, resulting in his death. The complaint alleged that his death was not caused by any act of the enemy and that at the time of his death the deceased was not bearing arms or side-arms. It further appears that the provision above quoted was not a part of the policy as originally printed and that the clause was printed and put in the policy referred to as a modification of the following conditions therein contained: "There are no restrictions under this policy as to residence, travel, occupation, or military or naval service." There were other allegations in the complaint, not material to a consideration of the questions raised here. Defendant demurred to the complaint, the demurrer was overruled, and from an order overruling the demurrer the defendant appeals.

For the appellant there was a brief by *Grace & Fridley* of Superior, and oral argument by *C. R. Fridley.*

For the respondent there was a brief by *Luse, Powell & Luse* of Superior, and oral argument by *L. K. Luse* and *C. Z. Luse.*

ROSENBERRY, J. The defendant admits that it is liable upon the policy to the extent of the premiums paid, but claims it is not liable for the full amount of the policy. It is admitted that at the time of his death the insured was engaged in the military service of the United States. The crucial question is, Did the insured die as a result, directly or indirectly, of engaging in the military service?

Having in mind the ordinary rule that all provisions, con-

ditions, or exceptions which tend to limit the liability of the insurer should be construed most strongly against the party preparing the contract and for whose benefit they are inserted *(French v. Fidelity & C. Co.* 135 Wis. 259, 115 N. W. 869), it is clear that the insurer did not intend by the language used to except from the policy death of the insured while in the military or naval service. The language used is not apt to express such an intention. The policy does not say that recovery shall be limited to the return of premiums paid if death shall occur while the insured is engaged in the service or work described, but the limitation applies only to death which occurs "as a result, directly or indirectly, of engaging in such service." While it is true that at the time the policy was written this country was not engaged in war, nevertheless the world war was then being carried on, and no doubt the clause was inserted by reason of the fact that persons insured might thereafter become engaged in military service. The limitation applies not only to the military or naval service of the United States but to that of any country. We think it is clear that the language was used for the purpose of limiting the liability to the return of the premiums in cases where death resulted directly or indirectly from some cause peculiar to the military service and one not common to military service and civilian life. The deceased came to his death by reason of an accident while riding a motorcycle under circumstances which were not in any way peculiar to the military service. Civilians are killed almost daily under similar circumstances. The hazards attendant upon riding a motorcycle under the facts set out in this case were no greater because the insured was engaged in the military service of the United States than if he were performing a like act as a civilian and apart from the military service. In other words, his death resulted from circumstances which are common to military and civil life. If this is not the meaning of the clause, it is difficult, if not practically impos-

sible, to ascribe any meaning to it, unless it be held that the fact that the deceased engaged in the military service operated as a limitation upon the liability of the insurer. Such a construction cannot be placed upon the clause for the reasons stated. We think this case is clearly distinguishable from *Coxe v. Employers' L. A. Corp.* [1916] 2 K. B. 629.

By the Court.—Order affirmed.

HUBBARD STEEL FOUNDRY COMPANY, Appellant, vs. FEDERAL BRIDGE & STRUCTURAL COMPANY, Respondent.

April 5—April 29, 1919.

Sales: Rescission for breach: Justification: Damages of buyer: Contemplation of parties: Stipulations: Admitting amounts of counterclaim: Effect.

1. Where a manufacturer and seller of steel castings was in default for nondelivery of a large quantity, and the buyer was warranted in believing that the seller was unable to make timely delivery of such castings as the contract called for, the buyer was justified in standing on a breach by the seller in furnishing castings which were seventy per cent. unfit, in declaring the contract ended, and in demanding return of its patterns to enable it to contract with others.
2. In an action by the seller for the price, the buyer counterclaiming for various damages on account of defective goods, an oral stipulation between counsel that the amounts of the items of the counterclaim specified in the buyer's exhibit were correct, but which admitted nothing as to the validity of the charges, rendered proper an allowance against the seller of all the items of the exhibit, if the seller's liability on the counterclaim was shown.
3. Where the buyer of steel castings indicated to the seller special circumstances concerning the buyer's contract to furnish castings to another party and the buyer's obligation to deliver thereunder, the seller, which broke the contract by delivering too high a percentage of defective castings, was liable to the buyer for the admitted amount of damages incurred by it through payment to the party to which it had agreed to furnish the castings itself.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff to recover the sum of $3,239.97 on account of steel castings alleged to have been made, sold, and delivered to the defendant under a contract. The defendant counterclaimed for $8,150 damages on account of alleged defective castings and delay in delivery.

On March 24, 1915, the plaintiff and defendant entered into a contract whereby the plaintiff agreed to furnish steel castings to the defendant for a certain railroad bridge known as the V., S. & P. bridge at Shreveport, Louisiana. This bridge was to be built for the Vicksburg, Shreveport & Pacific Railway Company by the Blodgett Construction Company of Kansas City, and the defendant company was under contract with the Blodgett Company for certain portions of the work. The castings were to be furnished by the plaintiff to the defendant, which in turn bought them to use in filling its contract with the Blodgett Company.

The plaintiff claims that the castings were made and delivered, and that, allowing the defendant credit on the account in the sum of $2,925.05 because of castings returned and credited at the same rate as purchased, there is now owing to the plaintiff from the defendant the sum of $3,239.97 and interest thereon at the rate of six per cent. per annum from and after the 31st day of August, 1915.

The defendant alleges that the plaintiff failed to deliver the castings within the time specified in the contract; that from time to time the plaintiff sent castings which failed to pass the inspection of R. W. Hunt & Co., as provided by the contract, and that on September 1, 1915, the defendant ordered the plaintiff to return the patterns for the castings and placed the order for them with another company; that due to the inability of the plaintiff to make the castings and the delay in the deliveries the defendant was prevented from

carrying out the terms of its contract with the Blodgett Company, and was obliged to pay the Blodgett Company heavy damages for such delay and to pay an increased cost for the castings to the second company contracted with and to spend large sums for machining the defective castings furnished by the plaintiff.

The case was tried before the court without a jury.

The court found, among other things, that the contract between plaintiff and defendant provided that the castings must pass the inspection of R. W. Hunt & Co. and must be shipped complete forty days after receipt of drawings, all defective castings to be replaced without charge; that prior to the execution of the contract between plaintiff and defendant, defendant had entered into a contract with the Blodgett Construction Company of Kansas City for the fabrication and superstructure of the swing-span bridge, which fact was well known to the plaintiff, by the terms of which contract defendant was to deliver all the steel and machinery necessary for the bridge on or before August 15, 1915; that the detailed drawings were sent to the plaintiff company on May 13, 1915; that plaintiff failed to furnish the castings required within the time specified by the contract; that seventy per cent. of the castings furnished by the plaintiff for inspection were rejected as defective when ten per cent. should have been the maximum rejections; that defendant company was delayed in the construction of the bridge to such an extent that on or about September 1st it removed its patterns from the possession of the plaintiff and entered into a new contract with the Falk Company of Milwaukee for the furnishing of the steel castings still remaining unfinished at that date; that the defendant company was justified in canceling its contract with the plaintiff and placing it elsewhere; that through the fault of the plaintiff defendant was forced to pay the Blodgett Company $2,000 damages; that because of the delay defendant company was deprived of the use of $41,872 for

seven months, which sum represents the amount which should have been paid them by the Blodgett Company on September 15, 1915, but which was not paid until April 15, 1916; that defendant company also suffered from the increased cost of the castings furnished by the Falk Company when defendant canceled the contract with the plaintiff and from the cost of machining defective castings.

In awarding damages the court found that the claim of the plaintiff company against the defendant for castings furnished under the contract hereinbefore set forth and for castings furnished under other contracts prior thereto aggregated the sum of $6,133.86; that defendant is entitled to set off against this as credits by virtue of damages paid, interest, and increased cost of castings and cost of machining defective castings, the sum of $6,684.67; that there is therefore due and owing to the defendant upon its counterclaim the sum of $551.39. Judgment to this effect was entered, from which appeal is taken.

For the appellant there was a brief by *Holt & Coombs* of Waukesha, attorneys, and *Chas. T. Hickox* of Milwaukee, of counsel, and oral argument by *Mr. Albert N. Coombs* and *Mr. Hickox.*

M. A. Jacobson of Waukesha, for the respondent.

SIEBECKER, J. The appellant contends that the court erred in finding that the evidence established (1) that the plaintiff's representative, Mr. Johnston, at the time of making the contract with defendant for the bridge material was informed by defendant's representative that defendant was a subcontractor of the Blodgett Company for the construction of the railroad bridge; (2) that the delivery of the material had to be completed on or before August 15, 1915, to enable defendant to fulfil its contract as subcontractor; (3) that the detailed drawings for the materials were in fact furnished within the time agreed upon; and (4) that sev-

enty per cent. of the castings furnished by plaintiff were defective and not in compliance with the contract. An examination of the evidence shows that there is ample evidence in the record to sustain the court's findings on these points. True, there is a sharp conflict in the evidence of Mr. Johnston and Mr. Raschig, the respective representatives of plaintiff and defendant at the time of negotiating the making of the contract for the steel castings and machinery, but it cannot be said that the trial court is clearly wrong in accepting the defendant's evidence on these issues as the correct version of the transaction. It is plain that the castings were so defective that about seventy per cent. had to be and in fact were rejected by R. W. Hunt & Co., who were selected by the parties to inspect them. Manifestly this percentage of unfit castings amounted to a failure by plaintiff to comply with the contract. It is practically undisputed that plaintiff on September 1, 1915, was in default for nondelivery of a large quantity of the castings called for by the contract and that defendant was warranted in believing that plaintiff was unable to make a timely delivery of such castings as the contract called for. Under these circumstances the defendant was fully justified in standing upon the breach, declaring the contract ended, and demanding the return of the patterns to enable it to contract with other parties for the castings plaintiff had failed to deliver. The proof is clear that the items defendant specified in the exhibit served with the complaint is a correct statement of the increased cost and expenses defendant was compelled to pay in machining the defective castings and securing others to fulfil its contracts. We are persuaded that the court's conclusions on all the litigated questions are correct. The allowance to defendant of the $2,000 item which defendant paid as agreed damages to the Blodgett Company in settlement for its breach of contract with that company needs to be considered in the light of the circumstances as disclosed by the record in the case.

It is claimed that the defendant was compelled to pay the Blodgett Company $2,000 as damages caused by default of plaintiff in not delivering the steel and the machinery as required by the contract between the plaintiff and defendant. The trial court found: "Because of defendant's failure to furnish the steel and machinery on or prior to June 15, 1915, the Blodgett Company suffered heavy damages, which damages the defendant company were obliged to pay and did pay to said Blodgett Company in the sum of $2,000." The defendant introduced in evidence a writing dated April 13, 1916, evidencing a payment by it of $2,000 to the Blodgett Construction Company in settlement and release of all damages claimed from defendant by the Blodgett Company for defendant's failure to comply with its contract to furnish machinery and castings for constructing the bridge in question. The testimony of Mr. Jacobson as to this settlement is in effect that he, as defendant's representative, went to New Orleans and Shreveport to adjust the differences between the defendant and the Blodgett Company arising by reason of defendant's inability to deliver this material at the time called for by its contract and on account of which default the Blodgett Company claimed to have been damaged in the sum of $6,000; that the Blodgett Company refused to pay the defendant any part of a large sum due the defendant until such claim for damage had been adjusted and paid; that a settlement thereof was effected by him upon the terms of the written release in the sum of $2,000, which was then deducted from the amount due defendant from the Blodgett Company. When this evidence had been received by the court upon the trial the following proceedings were had:

"Mr. Jacobson: Mr. Coombs and I have agreed, that is as to the items contained in Exhibit A of the pleadings, . . . that the amounts specified in Exhibit A are correct. They admit nothing so far as the validity of the charges are concerned; they merely admit the correctness of the amounts." Mr. Coombs: "There is one exception to that, as to the

amount of the interest." By the Court: "It is admitted that the amount of the several items contained in that exhibit are correct with the exception of the interest?" Mr. Coombs: "Yes, but we don't admit the justness of the charge."

The $2,000 item is one of the items in Exhibit A entered thus: "April 17, 1916, adj. of acct. with our customer acct. damages suffered by him due to delivery caused *entirely* by your inability to deliver acceptable castings, $2,000."

The trial court, acting on this evidence and admission, orally declared then and there that plaintiff caused and was liable in damage for the items specified in Exhibit A because of its failure to deliver the castings as required by its contract and "the amount of $2,000 paid by defendant in the settlement with the Blodgett Company." This record and the immediate action by the court thereon persuasively show that the court and counsel understood that plaintiff denied liability for all damage on the ground that plaintiff had no information concerning defendant's relation to the Blodgett Company for the delivery of this machinery and steel castings, and that if plaintiff is liable that all the items it specified as damage except the interest item in Exhibit A were proper items to be recovered. It follows from the stipulation that if liability of plaintiff on the counterclaim is shown, then all items of Exhibit A except the interest charge were to be allowed as the actual amount of damages defendant sustained and that the $2,000 the defendant paid as damages to the Blodgett Company, sustained by reason of plaintiff's breach of defendant's contract, was to be included. This is the fair and reasonable interpretation of the stipulation in the light of the action of the parties and the court in respect thereto. It is therefore considered that the court properly awarded recovery for this $2,000 on defendant's counterclaim upon the ground that the defendant communicated to plaintiff the special circumstances concerning defendant's contract with the Blodgett Company and defendant's obliga-

tion thereunder to furnish and deliver the machinery and steel castings.

This holding of the trial court is proper within the principles declared in *Saveland v. Green,* 36 Wis. 612; *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119; *Gross v. Heckert,* 120 Wis. 314, 97 N. W. 952. Judgment awarded on the counterclaim is correct and must stand.

By the Court.—Judgment is affirmed.

ENWRIGHT, Administratrix, Respondent, vs. GRIFFITH, Appellant.

April 5—April 29, 1919.

Limitation of actions: Contracts between husband and wife: Note maturing before marriage: Continued running of statute: Effect of partial payment: Evidence: Transactions with person since deceased.

1. The rule that the statute of limitations does not run between husband and wife on contracts made by them during coverture does not apply to contracts made, and upon which the statute had commenced to run, before coverture.
2. Where a promissory note was given by husband to wife, and the statute of limitations had commenced to run upon it, before their marriage, the statute continues to run after the marriage, and a payment made, during the marriage, upon the note before it was barred does not prevent its becoming barred six years later. Such a payment does not have the effect of making a new contract, but is merely a recognition of the old obligation, operating as an extension of the time of payment. [Whether, if such a payment were made during the marriage and after the note was barred, the statute would still continue to run, is not decided.]
3. Testimony of a husband, in a proceeding to contest his wife's will, respecting a payment by him, during coverture, upon a note which he had given to her before their marriage, was admissible when offered in evidence by her administratrix in an action against him on the note; but after the admission of such testimony it was competent for the husband, under sec. 4069, Stats., to explain or contradict it.

APPEAL from a judgment of the county court of Waukesha county: DAVID W. AGNEW, Judge. *Reversed.*

For the appellant there was a brief by *Lockney & Lowry* of Waukesha, attorneys, and *C. H. Van Alstine* of Milwaukee, of counsel, and a supplemental brief by *Lockney & Lowry;* and the cause was argued orally by *Mr. J. K. Lowry* and *Mr. Van Alstine.*

For the respondent there was a brief by *Hennessey, Hennessey & O'Boyle* of Milwaukee, attorneys, and *Vincent D. Hennessey* of counsel, and oral argument by *Vincent D. Hennessey.*

KERWIN, J. This action was brought upon a promissory note dated August 26, 1898, for $600, made by defendant, due one year after date, payable to one Agnes Enwright. After the execution of said note and in August, 1900, the defendant and Agnes Enwright married and were husband and wife until the death of Agnes on April 9, 1914. The plaintiff here is administratrix of the estate of Agnes Enwright. Judgment was entered in the court below in favor of the plaintiff and against the defendant, from which this appeal was taken.

Several errors are assigned which raise the points hereinafter considered.

1. Mrs. Griffith left a will which was contested by defendant and the children of Mr. and Mrs. Griffith. On the contest defendant was sworn, testified, and parts of his testimony in the will-contest case offered and received under objection in the instant case. This evidence was offered for the purpose of showing payment upon the note by defendant after his marriage to the deceased. The evidence as to payment on the note was very indefinite, but, assuming that it was sufficient to prove that a payment had been made by defendant to Mrs. Griffith personally on the note in suit, such payment was made before the statute of limitations had run

and at a date more than six years before the commencement of this action. It is unnecessary to decide, and we do not decide, whether, if payment were made during coverture upon the note in suit after the statute had run upon it, the statute would still continue to run during coverture and after such payment.

In the instant case it is established that the statute had not run when the alleged payment was made. The note was given before marriage, became due before marriage, and the statute had run upon it about a year before marriage. If any payment were made on the note it was made not later than 1904 and the suit was brought in 1917, so if the statute continued to run during coverture the note was barred and no action could be maintained thereon.

It is true this court has held that the statute of limitations does not run between husband and wife on contracts made by them during coverture. But we think this rule should not be extended so as to cover contracts made before coverture and when the statute had commenced to run before coverture.

It is well settled at common law that where the statute begins to run it continues unless interrupted by statutory provision. Our statute of limitations, sec. 4233, exempts from its operation (1) persons under twenty-one years of age, (2) insane persons, and (3) persons imprisoned on a criminal charge or in execution under sentence of a criminal court for less than his natural life. We are convinced that the rule of public policy laid down by this court to the effect that the statute of limitations does not run between husband and wife on contracts made by them during coverture, does not apply to cases where the contract was made before coverture and the statute commenced to run before marriage. *Charmley v. Charmley,* 125 Wis. 297, 103 N. W. 1106; *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681; *Fawcett v. Fawcett,* 85 Wis. 332, 55 N. W. 405; *Dekay v. Darrah's Adm'rs,* 14 N. J. Law, 288.

But it is contended that the alleged payment had the effect of making a new contract at the time of payment and that, such payment being made during coverture, the statute did not thereafter run upon the note. This contention cannot be sustained. The payment was merely a recognition of the old obligation and operated as an extension of the time of payment. *Engmann v. Estate of Immel,* 59 Wis. 249, 18 N. W. 182; sec. 4247, Stats.; *Marshall v. Holmes,* 68 Wis. 555, 559, 32 N. W. 685; *Lyle v. Esser,* 98 Wis. 234, 73 N. W. 1008; *Hughes v. Thomas,* 131 Wis. 315, 111 N. W. 474. The effect of part payment before the statute has run is to continue the old obligation, which is governed by the status of the parties at the time the contract was made, and hence the statute continued to run. The record shows that the payment, if any were made on the note, was made when Mrs. Griffith came into possession of the property, which was in 1904. Counsel for respondent concedes that the alleged payment was made in January, 1904.

It is further contended by appellant that it was error to admit in evidence the testimony of defendant taken in the will contest respecting payment on the note. This evidence was competent and there was no error in receiving it. *Weissman v. Weissman,* 156 Wis. 26, 145 N. W. 230; *Voelkel v. Supreme Tent K. M. W.* 116 Wis. 202, 92 N. W. 1104; *Crowe v. Colbeth,* 63 Wis. 643, 24 N. W. 478; *Woodworth v. Mills,* 61 Wis. 44, 20 N. W. 728; *Hunter v. Gibbs,* 79 Wis. 70, 48 N. W. 257; 16 Cyc. 977. But the court excluded evidence offered by appellant tending to contradict and explain such evidence, on the ground that it was not admissible because it involved a transaction with the deceased. Secs. 4068, 4069, and 4070, Stats. In this regard the court was in error. The evidence offered by plaintiff and received related to the payment alleged to have been made by defendant to Mrs. Griffith during her lifetime and opened the door for the evidence offered by defendant and it should have been received. Sec. 4069, Stats.; *Estate of Gil-*

bert, 167 Wis. 291, 166 N. W. 442, 167 N. W. 447; *Currie v. Michie,* 123 Wis. 120, 101 N. W. 370; *Moore v. May,* 117 Wis. 192, 94 N. W. 45; *Anderson v. Anderson,* 136 Wis. 328, 117 N. W. 801; *Smith's Appeal,* 52 Mich. 415, 18 N. W. 195.

But in the view we take of the case, as hereinbefore shown, the note was barred upon the plaintiff's showing, and therefore a verdict should have been directed for the defendant.

By the Court.—The judgment is reversed, and the cause remanded with instructions to enter judgment for the defendant.

MCNAUGHTON, Respondent, vs. MCCLURE, Executor, Appellant.

SAME, Appellant, vs. SAME, Respondent.

April 5—April 29, 1919.

Executors and administrators: Claims against estate: Evidence: Materiality: Pleading: Amendment to conform to proof: Trial: Special verdict: Questions to be submitted: Appeal: Harmless error: Wills: Construction: Contract to devise: Legacy to creditor.

1. In an action for personal services rendered a deceased, testimony of plaintiff that before she began her services with deceased her health was as near perfect as could be, and that at deceased's death she considered herself not only a physical but a mental wreck, was not competent and should not have been admitted.
2. Error in permitting claimant to so testify was not prejudicial, where she recovered upon an express contract.
3. In an action for $8,000 for services against the estate of a deceased person under an alleged contract, where both parties were somewhat in the dark as to what they could prove, the court did not abuse its discretion in allowing claimant to amend to show that the amount due to her was $9,605.52, to conform to the evidence.
4. Where the parties attempted to prove different forms of contract, a question embodying the contract as claimed by defendant, as well as one embodying the contract claimed by the other side, should have been included in the special verdict.

5. In such a case it was not prejudicial error to refuse to submit a question as to whether the parties had entered into such a contract as defendant attempted to prove, where the court instructed, "If you are satisfied to a reasonable certainty," etc., "that the agreement referred to in the second question [the agreement set up by plaintiff] was entered into and made by and between," etc., "you will answer the question 'Yes,' and if you are not so satisfied your answer will be 'No;'" an affirmative answer negativing any other contract.
6. The question whether deceased had agreed to will plaintiff one half of her estate in return for the services sued for, is properly for the jury.
7. Ordinarily a legatee who has a valid claim may take under the will and also enforce his claim against the estate.
8. The legacies in this case are *held* to have been intended as payment for services rendered, and hence the legatee was not entitled both to the contract price of her services and the legacies.
9. The evidence is *held* to show that a diamond ring given claimant by deceased was intended as a gift and not in payment for claimant's services.

APPEALS from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Modified and affirmed.*

Proceedings begun in the county court of Dodge county to collect a claim for personal services against the estate of Martha L. Sherman, deceased.

Claimant, a woman about seventy-two or seventy-three years of age in 1912, maintains that in the fall of that year she entered into a contract with the deceased, a widow, then eighty-seven or eighty-eight years old, to care for her the rest of her life in consideration of the deceased giving claimant one half of her personal estate, which at the time of her death amounted to $9,605.52. She entered upon her services December 24, 1912, and continued the same till January 14, 1917, when Mrs. Sherman died. The defendant claims that the agreement between the parties was that Mrs. Sherman should give claimant the use of her homestead for life, the use of a sufficient sum of money to maintain herself there,

and $1,000 in cash, and that such compensation should be made in Mrs. Sherman's will, and that it was in substance so made. In her last will Mrs. Sherman gave claimant $200 in cash, the use of the homestead for life, and the use for life of the personal estate less about $7,300 in specific legacies, or the use of about $11,911.05, which with $615, admitted to have been paid claimant in the lifetime of Mrs. Sherman, and $300, the value of a diamond ring given her, besides providing for her funeral expenses, would amount to substantially what was agreed to be given her, according to defendant's contentions.

The jury found (1) that the reasonable value of claimant's services was $6,330 and (2) that it was agreed between claimant and the deceased that claimant was to receive one half of the personal estate left by deceased. The trial court entered judgment in favor of claimant for the sum of $8,432.52, being $9,605.52, or one half the estate, less the sum of $615, admitted to have been paid claimant in the lifetime of deceased, of $300, the value of the diamond ring, and of $258, the stipulated value of the use of the homestead, on condition that she renounce her claim under the will. Both parties appealed from the judgment.

For the plaintiff there was a brief by *Clark & Lueck* of Beaver Dam, and oral argument by *A. W. Lueck* and *Royal F. Clark.*

For the defendant there were briefs by *Chas. C. Miller* of Beaver Dam, *John J. Keefe* of St. Paul, Minnesota, and *James F. Malone* of Beaver Dam, and oral argument by *Mr. Malone* and *Mr. Keefe.*

VINJE, J. Upon defendant's appeal it is contended that the court erred (a) in the admission of testimony; (b) in allowing an amendment to the complaint; (c) in refusing to submit questions requested by defendant; (d) that the verdict is not supported by the evidence; (e) that claimant's

taking under the will estops her from enforcing any claim; and (f) that judgment should be *in specie* and not in cash.

(a) The court over objection permitted claimant to testify that before she began her service with deceased her health was as near perfect as could be; that she rarely had any sickness, and was strong and able to do the work she was doing, but that at the time of Mrs. Sherman's death she considered herself not only a physical but mental wreck, and that she could not do the work she was doing before. The admission of such testimony was error. How it affected her health had no bearing upon the value of her services or upon what the agreement between the parties was, especially so since she described accurately and in detail what the nature and extent of her services were. But in view of the testimony and finding as to the value of such services, and especially in view of the fact that claimant recovers upon an express contract and not upon *quantum meruit,* we cannot say that the admission of such testimony was prejudicial error. It could not have affected the question of contract, or no contract, or of what the contract was.

(b) The original claim was for $8,000. After the evidence was in claimant moved to amend it by making it one half of the personal estate, or $9,605.52, and the motion was granted. This was to conform to the testimony in the case, the substance of which will be stated later. Both parties were somewhat in the dark as to what they could prove, and we perceive no abuse of discretion in allowing the amendment. Defendant made claim that the contract outlined in the statement of facts was entered into. Claimant by her evidence tended to show another contract. So the question of what the contract was, was litigated and became an issue by the evidence. An amendment to the complaint to conform to the evidence was therefore proper.

(c) Among the questions submitted by the defendant was the following: "Was it agreed between *Mary L. McNaugh-*

ton and Martha L. Sherman that compensation for the services rendered by said *Mary L. McNaughton* should be made by the last will of said Martha L. Sherman?" While this question does not embody the specific terms of the agreement claimed by defendant to have been made between the parties, it sufficiently called the trial court's attention to the matter of his claim, and it should have been submitted. Due exception to the court's refusal to submit it is recited in the bill of exceptions. A question embodying the contract as claimed by defendant as well as one embodying the contract claimed by the other side should have been included in the special verdict. Only by so doing would the claims of the respective parties be fairly and equally presented to the jury, and a verdict returned upon which a judgment could be entered no matter how the jury answered the questions. This is said on the assumption that, since both parties insisted a contract was made, the jury would find either for the contention of one party or the other as to what the contract was. In the instant case, if the jury had returned a negative answer to the last question submitted the verdict would have been incomplete, for neither party claimed the contract was to pay the reasonable value of the services.

But since the jury found the contract was as contended for by claimant, the question is, Was the failure to submit the alternative contract prejudicial error? No doubt it can be truly said that, since that question was not submitted, the jury might believe there was little or no merit in it, and were it not for the specific instructions given under the second question we would be inclined to the view that the court's refusal to give it was prejudicial error. But the court said:

"If you are satisfied to a reasonable certainty and by a preponderance of the evidence that the agreement referred to in the second question was entered into and made by and between *Mary L. McNaughton* and Mrs. Sherman, you will answer the question 'Yes,' and if you are not so satisfied your answer will be 'No.' "

Under such instructions an affirmative answer negatived any other contract. And it must be presumed the jury would not have answered the question "Yes" had they believed the contract was as claimed by the defendant. His claim for the existence of such a contract rested mainly upon admissions made by claimant in two letters introduced in evidence in which she spoke of an agreement in substance such as defendant claimed, supplemented by an admission to the like effect given upon the trial. On the other hand, the proof of the contract found by the jury rested upon the testimony of one Mr. Newton, who had been a lifelong friend of Mrs. Sherman, which was to the effect that sometime before claimant entered upon her service Mrs. Sherman told him that she had made an agreement with claimant to pay her one half of her estate for caring for her the rest of her life.

(d) Under the evidence supporting the claims of the respective parties briefly outlined above, it became a question of fact for the jury to determine which was true. Both claims rested upon admissions. It was for the jury to determine the probative force of each. There is nothing in the attendant facts or circumstances which would warrant this court in disturbing a finding made either way. Hence the conclusion reached by the jury cannot be disturbed.

(e) Ordinarily a legatee who has a valid claim may take under the will and also enforce his claim against the estate. 2 Woerner, Am. Law of Admin. (2d ed.) *975; *Farnham v. Barker,* 148 Mass. 204, 19 N. E. 371. Claimant in this case has sought to do both. Such conduct spells neither election nor estoppel, for there is nothing inconsistent or inequitable about it.

(f) The trial court properly reached the conclusion that one half of the personal estate of the deceased was the measure of the amount of money claimant was to receive for her services. It was not contemplated by the parties under the

contract made that the personal estate was to be divided *in specie* and one half thereof given to claimant.

Upon the claimant's appeal it is contended that the court erred in holding (1) that she could not take under the will and also enforce her claim, and (2) in deducting from the judgment $300, the value of the diamond ring given her.

(1) It seems to us that the trial court correctly concluded that it could not have been the intention or understanding of the parties that claimant was to receive one half of the personal estate and in addition thereto also take under the will. Mrs. Sherman was a very old woman at the time the contract was made and in the course of nature did not have long to live. She had a fine home and kept two maids. When she was seriously ill a nurse was called in. Claimant's position was that of a companion more than that of a servant. This was known and understood at the time the contract was entered into. And while it is in evidence that Mrs. Sherman became quite deaf and was irritable, it must not be forgotten that claimant was given a fine home and enjoyed the comforts thereof. The trial court held that deceased by her bequests in the will to claimant intended payment for services rendered. This interpretation of the will, we think, is the proper one. That being so, it follows that claimant cannot take both under the will and the contract, for that would be double payment for the same services. 2 Woerner, Am. Law of Admin. (2d ed.) *975. The contract compensation is liberal payment for the services rendered, even if they were as arduous as she claims they were.

(2) We are unable to find any testimony that the diamond ring was given in pay for services. It was given claimant by Mrs. Sherman in her lifetime and as a present from our understanding of the testimony. The only evidence relating to the matter is this from the claimant given on her cross-examination: "I received a diamond ring that had been promised me for years, one of Mrs. Sherman's

rings." This, we construe, constituted a gift and not a payment, though claimant sold it later for $300.

By the Court.—Upon claimant's appeal the judgment is modified by adding thereto the sum of $300 as of the time of its rendition, and as so modified is affirmed, with one bill of costs to be taxed in her favor. The defendant will take nothing upon his appeal.

STATE BANK OF WAUPUN, Appellant, vs. STORM, imp., Respondent.

April 5—April 29, 1919.

Homestead: Exemption: Intent to occupy land as homestead: Overt act: Evidence.

1. To make land exempt as a homestead before a lien attaches, there must have existed on the part of the owner an intention in good faith to occupy the premises as a homestead prior to the time when the lien attached, which intention must have been evidenced by some overt act indicating a purpose to make the premises a homestead.
2. Where the owner of land, with premises used as a saloon, left his former residence and moved onto such premises, the fact that he discharged his bartender, who had formerly managed the saloon, required the bartender to move from the premises so as to make room for his family, and took over the business, though his family, because of illness, could not leave their former residence, was an overt act and sufficient evidence of intention to make the property his homestead.
3. The fact that the owner took out a license for a saloon to be conducted on the premises is entitled to some weight upon the question whether he intended to make such premises his homestead.

APPEAL from an order of the circuit court for Juneau county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The defendant is the head of a family. For about six years prior to the time in question he had occupied a house in the city of Waupun. In 1912 he purchased a place at Bur-

nett, consisting of a lot upon which there was a residence, and adjacent to the residence he built a saloon. He continued his business at Waupun and continued to live there, renting the saloon at Burnett. On May 6th, while the family of the defendant was still at Waupun, the defendant in the meantime having taken over the saloon at Burnett, the residence and saloon were destroyed by fire. There was upon the property at the time a policy of insurance issued by the garnishee defendant. The plaintiff commenced suit against the defendant and garnished the moneys in the hands of the garnishee defendant. The trial court held that the insurance was exempt because it was in effect the proceeds of a homestead. Sub. (17), sec. 2982, Stats. From the order of the circuit court plaintiff appeals. Other facts are stated in the opinion.

For the appellant there was a brief by *Lines, Spooner & Quarles,* and oral argument by *Leo Mann,* all of Milwaukee.

For the respondent there was a brief by *Wangerin & Wengert* of Milwaukee, and oral argument by *Eugene Wengert.*

ROSENBERRY, J. Sec. 2983, Stats., provides as follows:

"A homestead to be selected by the owner thereof . . . and the dwelling house thereon and its appurtenances owned and occupied by any resident of this state shall be exempt from seizure or sale on execution, from the lien of every judgment and from liability in any form for the debts of such owner to the amount in value of five thousand dollars."

The section further provides that the exemption shall not be impaired by temporary removal nor by sale, but shall extend to the proceeds derived from such sale while it is held with the intention of procuring another homestead, and contains certain other provisions not material here.

Adjacent to the brewery at Waupun there was a house which was occupied by the defendant. Prior to July 1, 1916, the saloon and residence at Burnett were leased to

various tenants. On July 1, 1916, the defendant took out a license in his own name and engaged a barkeeper to run the saloon. Meantime a mortgage upon the brewery property at Waupun had been foreclosed, although the period of redemption had not fully expired. The defendant testified:

"After we sold the beer [referring to the last sale at Waupun] I went into my property at Burnett in the saloon business and intended to move my family down there too, but the youngest child, two years of age, had pneumonia, and being very sick we could not move him. At that time, March 27th, I had a bartender and I discharged him and ran the business myself. I couldn't move my family on account of sickness."

The men who ran the business lived in the premises with their families, those who had families.

The question is whether or not, under the facts and circumstances, the land became the homestead of the defendant in a legal sense before the lien attached. In order to bring the property within the exemption there must, of course, have existed on the part of the defendant an intention in good faith to occupy the premises as a homestead; such intention must have existed prior to the time when the lien attached, and it must have been evidenced by some overt act indicating a purpose to make the premises a homestead. *Scofield v. Hopkins,* 61 Wis. 370, 21 N. W. 259. The defendant had no other homestead.

It is argued that there is no overt act which evidences an intention on the part of the defendant to make the property in question his homestead. We think the discharge of the bartender, which required him to move his family from the premises so that they could be occupied by the defendant, together with the taking over of the business by the defendant, is sufficient evidence of his intention, and under all the circumstances an overt act within the meaning of the law.

It is also argued that the fact that the defendant took charge of the saloon is not significant, because he may have intended to run the business until the license expired, and

that the act is as consistent with one course as with the other. The fact that in July of the previous year he took out the license in his own name should be given some weight. In *Shaw v. Kirby,* 93 Wis. 379, 67 N. W. 700, up to the time of entering the judgment there was no overt act which was not as consistent with an intent to improve and sell the farm as with the intent to improve and occupy it; nevertheless the homestead claim was upheld. In that case there was subsequent actual occupancy; here it was rendered impossible. In that case the intent may have been formed after entry of judgment; here the taking out of the license, the closing out of the business at Waupun, the discharge of the bartender, his vacation of the premises, the occupancy by the defendant as far as his circumstances permitted, together with his declared intention, are circumstances sufficient to establish the character of the premises as a homestead.

By the Court.—Order affirmed.

ESCHWEILER and OWEN, JJ., dissent.

STATE EX REL. MASON, Respondent, vs. LARSEN, County Treasurer, Appellant.

April 3—May 13, 1919.

Tax sales: County treasurer: Constitutional law: Statutes: Construction: Legislative intent: Taxation: Delinquent tax sales: Competitive bidding: Special laws: Statute abrogating competitive bidding: Equal protection of the laws.

1. Sec. 1138*m,* Stats. 1917 (ch. 268, Laws 1917), providing that a county board may authorize the county treasurer to become the purchaser of lands sold for general taxes, is *held* to constitute the county treasurer the exclusive bidder at the tax sale of real estate which he is authorized to purchase.
2. As so construed, it denies to one taxpayer competitive bidding at the tax sale which it extends to another, and violates the provisions of sec. 1, amendm. XIV, Const. of U. S., guaranteeing the equal protection of the laws, as well as equivalent provisions of the state constitution.

3. The enactment of a statute without a purpose should not be attributed to the legislature.
4. Sec. 1191, Stats. 1917, providing that the county shall be the exclusive purchaser at a tax sale of property upon which it holds any certificate of sale, is valid; the state and county, in such case, having an interest which may be protected by withholding the lands from competitive bidding.

ESCHWEILER, J., dissents in part.

APPEAL from a judgment of the circuit court for Polk county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This is an action of *mandamus,* brought to compel the defendant as county treasurer of Polk county to accept the plaintiff's bid made by him upon the sale of certain lands for delinquent taxes and to issue certificates thereon as provided by law. Acting under sec. 1138*m,* Stats., the county board directed the defendant to bid in and purchase for the county all lands sold for taxes. Pursuant to such direction the defendant at the opening of the sale announced to the bidders assembled, including plaintiff, that the several tracts of land would not be offered for competitive bidding, but that the county would be the exclusive bidder therefor at the sale and that no other bids would be accepted. As the several descriptions were called, the county treasurer in behalf of the county bid therefor the taxes and charges against the land and the plaintiff bid the same for the north half of each tract, but this bid was ignored and the land was declared sold to the county. Plaintiff's bid was upon the sale of lands against which no special taxes were levied or returned delinquent and against which there were no outstanding tax certificates. Immediately after the sale plaintiff demanded that the treasurer issue to him tax certificates and he offered to pay the amount of his several bids, and he brings this action to compel the issuance of tax certificates to him on his bid. From a judgment allowing a peremptory writ the defendant appeals.

For the appellant there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *C. S.*

Roberts, district attorney, and oral argument by *Mr. Brossard.*

For the respondent there was a brief by *Kennedy & Yates* of Amery, and oral argument by *W. T. Kennedy.*

OWEN, J. Except as modified by sec. 1138*m,* Stats. (ch. 268, Laws 1917), the statutes provide that lands returned delinquent for the nonpayment of taxes shall, on a day fixed, be sold at public sale to the person offering at such sale to pay the taxes, interest, and charges thereon for the least quantity thereof. Secs. 1135, 1136, Stats. The sale is competitive, the successful purchaser being the one who offers to pay the taxes for the smallest portion of the land against which the same are assessed. Sec. 1138*m* reads:

"The county board of any county may authorize and direct the county treasurer to bid in and become the purchaser of any or all such lands as are sold for general taxes only for the amount of such general taxes, interest and charges remaining unpaid thereon, excepting such lands against which there are outstanding certificates of sale. All laws relating to the sale or purchase of lands sold for the nonpayment of such taxes, and to the redemption of such lands, shall apply and be deemed to relate to the sale or purchase of such lands by the county."

It should be noted that this section is effective only in those counties where the county board acts under the authority given, and directs the county treasurer to "bid in" and become the purchaser of any or all such lands as are sold for general taxes only.

The question first arising is whether this section constitutes the county treasurer, when authorized by the county board under its provisions, the exclusive bidder at the tax sale. Appellant contends for this construction, while respondent claims that it merely authorizes the treasurer to become a competitive bidder, and that if the treasurer is made the exclusive bidder then the statute is unconstitutional.

It seems clear that the legislature intended by the enactment of the section in question to eliminate competition at tax sales and to constitute the county treasurer the exclusive bidder and purchaser thereat where the county board acted under its provisions. Unless such was the legislative purpose the enactment of the law was useless. By sec. 1138 it was already provided that

"If any tract of land cannot be sold for the amount of taxes, interest and charges thereon it shall be passed over for the time being, but shall, before the close of the sale, be reoffered for sale; and if the same cannot be sold for the amount aforesaid, the county treasurer shall bid off the same for the county for such amount."

By virtue of this section the county becomes the purchaser of all lands for which there are no bidders at the sale. It is true that the county does not become the purchaser unless there are no bidders at the sale. Sec. 1138*m*, if construed to constitute the treasurer a competitive bidder, does not change that result, for, under its provisions, the county treasurer cannot bid less than the whole amount of the lands for the amount of the general taxes, interest, and charges remaining unpaid thereon. The only difference between the two sections, if sec. 1138*m* is not construed to constitute the county treasurer the exclusive bidder, is this: under sec. 1138*m* the county treasurer may make the first bid, while under sec. 1138 the county becomes the purchaser only in the event that there are no bidders. The practical result, however, is the same. Any person who bids less than the whole amount of the land for the taxes assessed thereon forces the treasurer from the field. His power is exhausted when he bids the entire tract. Any bid for less than the entire tract constitutes a lower bid and entitles the bidder to the certificate of sale; so that if there are bidders present, as a practical proposition the county cannot become the purchaser of the land unless the treasurer is the exclusive bidder; and if

there are no bidders present, the county becomes the purchaser under the law as it stood prior to the enactment of sec. 1138*m*. Unless, therefore, the section is to be construed as constituting the county treasurer the exclusive bidder at the sale its enactment was without purpose, something which should not be attributed to the legislature, even for the purpose of holding a law constitutional. Almost any statute can be held constitutional if it be construed as vain or futile legislation. We accord the legislature greater deference by ascribing virility to its enactments and treating them as legislative assertions of its power in the premises.

As so construed, is the law constitutional? The purpose of the sale of lands for taxes is to coerce the payment of the taxes and to enforce the lien arising from their imposition. The equal protection of the law requires that taxpayers owning real estate of the same kind and nature, similarly situated, shall be accorded equal treatment in such a proceeding. Competitive bidding at a tax sale is certainly a material and valuable right, and it cannot be granted to one and denied to another, similarly situated, consistent with the provisions of sec. 1 of the Fourteenth amendment of the constitution of the United States, which prohibits any state from making or enforcing any law denying to any person within its jurisdiction the equal protection of the law. It is true that classification of persons and things is permissible under this constitutional provision, but it should constantly be borne in mind that such classification must be germane to the purposes of the legislation.

As already stated, the purpose of laws providing for the sale of lands for taxes is to coerce the payment of taxes imposed thereon and to enforce the lien arising from their imposition in case they be not eventually paid. With this in mind, let us examine the classification provided for by sec. 1138*m*. It permits competitive bidding at tax sales upon tracts of land against which special as well as general taxes have been assessed, while it prohibits competitive bidding

upon tracts of land against which general taxes only have been assessed. It also permits competitive bidding upon tracts of land against which only general taxes have been assessed but which were delinquent the prior year, the certificate of which sale is held by a third party, while it prohibits competitive bidding where the taxes were paid the year before. Can such distinctions be said to be germane to the purposes of the legislation? The taxpayer who was in default in the payment of his taxes the prior year enjoys the benefits of competition at the sale, while the taxpayer who promptly and obediently paid his taxes the year before is denied that privilege. His entire tract must go for the taxes. Similarly, the entire tract of land against which only general taxes are assessed is bid in, while the adjacent lot against which special as well as general taxes are assessed is the subject of competitive bidding at the sale. We are utterly unable to see any relation between the distinctions thus made and the purposes of the legislation. Under this law the good citizen and the willing taxpayer is denied the right of competitive bidding which is extended to his neighbor who defaulted in the payment of his taxes the prior year. Again, the entire tract must go where only general taxes are assessed against it, while a tract against which special as well as general taxes have been assessed becomes the subject of competitive bidding.

The purpose of the law seems to be to secure to the county the most desirable tax certificates and is evidently based on the theory that while the county is compelled to take the less desirable lands it should have a monopoly on those which constitute a gilt-edged investment, leaving those constituting a more questionable security to the competition of private bidders. We may concede, for the purposes of the argument, that the question of whether such a plan promotes the ultimate purpose of all tax laws, *i. e.* the raising of money to meet the expenses of government, is a legislative question. It may be conceded, too, that, as contended by the learned

attorney general, the legislature might provide that all lands on which the taxes have remained delinquent for a certain length of time shall be forfeited to the county or state upon notice to the taxpayer and an opportunity for him to be heard (37 Cyc. 1547) without affecting the question we are here considering. Under such a law all taxpayers are treated alike, while the vice of this law consists in arbitrary discrimination, not based on differences existing between the taxpayers, or the property taxed, or differences calling for a different remedy or proceeding in order to collect the tax. On the contrary, it is quite apparent that the classification was made to depend upon this question: What tax certificates constitute perfectly safe security? That question decided, the county was given a monopoly thereof. This is fairly revealed by a consideration of the history of the legislation. As originally introduced, the county treasurer was authorized to bid in all lands returned delinquent for taxes when directed by the county board. Two amendments offered to the bill were adopted, each of which restricted the class of certificates of which the county might become the purchaser, and resulted in the enactment of the law in its present form, all of which indicates that the dominating legislative idea was the security of the county. While it was no doubt considered that the law opened up a profitable field of investment for the counties by making them the beneficiaries of the high interest rates charged to delinquent taxpayers, that result cannot be accomplished by arbitrarily depriving one taxpayer of valuable rights and privileges extended to another.

We cannot resist the conclusion that this law offends not only against the provision of the federal constitution already referred to, but violates equivalent provisions of the state constitution as well.

It should be remarked that the foregoing considerations do not apply to sec. 1191, Stats., which provides that the county shall be the exclusive purchaser at the tax sale of property upon which the county holds any certificates of tax

sales. When a taxpayer first permits his taxes to become delinquent he enjoys the benefit of competition at the sale. If no third party bids on his land the county becomes the purchaser thereof. Thereafter the state and county have an interest therein which the state may protect by withholding the lands from competitive bidding at any subsequent sale so long as it has such interest. The interest of the state in the lands distinguishes them from lands owned exclusively by private parties and justifies special classification by which they are accorded special treatment, to the end that the state may protect its interest therein.

It is our conclusion that the statute is unconstitutional and void and that the judgment of the trial court was right. While the judgment must be affirmed, we do not think that we should grant costs against appellant, who is a public officer. He found the law upon the statute books. The county board of his county directed him to proceed under it. He should not be compelled to determine its validity at his own peril.

By the Court.—Judgment affirmed. The appellant will pay the clerk's fees. No other costs to be taxed.

ESCHWEILER, J. *(dissenting in part).* I dissent from so much of the majority opinion herein as construes sec. 1138*m*, Stats., as intending to give the county board the power to authorize and direct its county treasurer to become the *exclusive* purchaser for it of the lands sold for general taxes as therein described.

At the time of the enactment of this section by ch. 268, Laws 1917, there was then on the Statutes, and had been for a long time, sec. 1191, which reads as follows:

"Real property upon which the county holds any certificate of tax sale shall continue liable to taxation and to sale for unpaid taxes, and the county shall be the *exclusive* purchaser at the sale."

The omission of the word "exclusive" in the new statute,

sec. 1138*m*, which relates to the same power to purchase at tax sales as the older statute, sec. 1191, warrants a strong presumption that the word was purposely omitted. It is hardly likely that such a new statute would be drafted, several times amended, and then passed, without some consideration of the statutes on the same subject. Of course if it was purposely omitted it is judicial legislation to insert it.

The last sentence of sec. 1138*m* reads as follows:

"All laws relating to the sale or purchase of lands sold for the nonpayment of such taxes, and to the redemption of such lands, shall apply and be deemed to relate to the sale or purchase of such lands by the county."

The construction given by the majority to this law is to make this last sentence of sec. 1138*m* practically of no effect at least as to several important provisions. Among such laws is sec. 1135, which provides that the treasurer shall continue to offer for sale the respective parcels until so much of each parcel thereof shall be sold as shall be sufficient to pay the taxes, etc. This section is wiped out by permitting the county treasurer to become the exclusive purchaser at such sale.

Sec. 1136 provides that the person offering at such sale to pay the taxes, interest, and charges on any tract of land for the least quantity thereof shall be the purchaser of such quantity, and provides that only in case no bid be made for a portion of such tract of land then the whole of said tract shall be sold.

Sec. 1138 provides that where a tract cannot be sold for the amount of taxes, interest, and charges it shall be passed over for the time being, but shall be reoffered for sale before the close of the sale.

These two sections also seem to be entirely discarded, in spite of its express language, by the construction now given to sec. 1138*m*. The mere fact that the county would occupy a much more advantageous position in the tax-sale market as an exclusive purchaser than as a competitive purchaser does

not appear to me to be sufficient reason for charging the legislature with intending to obtain the greater advantage rather than the lesser, when the effect of such choice is now declared to be that they have not done the one and cannot do the other.

I think, therefore, that to place such a construction upon a statute and then proceed to declare it unconstitutional is contrary to the heretofore universal practice of courts in always striving to adopt constructions which will support rather than overthrow legislation. *State ex rel. Owen v. Donald,* 161 Wis. 188, 192, 153 N. W. 238.

The sale of lands, the owner of which has failed to pay his taxes, is primarily for the purpose of collecting revenues. *Buell v. Arnold,* 124 Wis. 65, 71, 102 N. W. 338; *Iron River v. Bayfield Co.* 106 Wis. 587, 592, 82 N. W. 559; *Oneida Co. v. Tibbits,* 125 Wis. 9, 12, 102 N. W. 897. It has never before been held that such statutes should be construed as intending to permit governmental agencies to become dealers in real estate.

A construction of this statute to the effect that the county might become a competitive bidder to the extent and on such lands as it deemed best, with other bidders on such sales, would, it seems to me, place the statute in harmony with the general revenue-producing purpose of the taxation statutes, insert nothing in the text which the legislature left out, and, above all, recognize it as being within rather than without the constitutional power of the legislature.

LEVY, Appellant, vs. SATTLER and others, Respondents.

March 6—May 27, 1919.

Corporations: Treasury stock: Sale: Right to purchase: Evidence.

1. Where only part of the stock of a corporation was issued, a purchaser of stock already issued takes with it the resulting right to take his proportionate share of any stock subsequently issued; but if he merely purchases unissued stock, he has no right to participate in any issue of stock made before his agreement to purchase was carried out.
2. In an action by a purchaser of corporate stock to declare the total amount of unlawfully issued stock less than the amount on the books, the evidence is *held* to warrant a finding that plaintiff's purchase was of unissued treasury stock and not of stock already issued.

APPEALS from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This is an action in equity brought by the plaintiff, the owner of fifty shares of stock of $100 each in the *Milwaukee Knitting Company* (a corporation), against the other stockholders to obtain a judgment declaring the total amount of legally issued stock of the corporation to be 250 shares instead of 430 shares (the amount actually issued), thus making him the owner of one fifth of the capital stock, and to obtain other incidental relief such as the formal cancellation of the stock issued exceeding 250 shares, the setting aside of the election of directors as well as the proceedings of the acting board of directors, and the calling of a new meeting of legal stockholders for the election of directors.

The fundamental undisputed facts are that the *Milwaukee Knitting Company* in December, 1914, had an authorized capital stock of $50,000 divided into 500 shares of $100 each, of which only 250 shares had been issued, owned as follows: the defendant *Sattler* 99 shares, the defendant *H. M. Levy* 100 shares, the defendant *L. E. Trevett* 50 shares, and one Idzal, son-in-law of *Sattler,* one share, and that the plaintiff in August, 1916, orally agreed to purchase fifty

shares of stock of the defendants *Sattler* and *H. M. Levy,* purchasing twenty-five shares of each respectively, but as a part of the same transaction. The share in the name of Idzal was in fact the property of *Sattler.*

The principal question in the case is whether these shares purchased by the plaintiff were part of the issued and paid-up stock, as claimed by plaintiff, or were shares to be issued out of the 250 shares still unissued and called treasury stock by the parties to this litigation.

It is claimed by the defendant *Sattler* and found by the court that prior to this sale of stock to the plaintiff the defendants *Sattler* and *H. M. Levy,* who were respectively president and secretary-treasurer of the corporation, agreed that they would purchase the entire 250 shares of unissued stock in equal shares. To this agreement *Trevett* was not a party, and nothing had been done under it prior to the sale of stock to the plaintiff. The court found that by the terms of the plaintiff's oral contract of purchase he was to receive from each of the defendants *Sattler* and *H. M. Levy* twenty-five shares of the stock subscribed for and *to be issued,* paying therefor $100 per share, and in addition a bonus to be later determined, the stock to be transferred upon payment of the purchase price and after distribution of accumulated surplus, dividends, and profits for the year ending December 31, 1916, and that as part of the same transaction the plaintiff agreed that he would give up his business at Duluth and enter the employ of the corporation. The court further found that about December 1, 1916, the plaintiff began to work for the corporation and left Milwaukee in that service early in January, 1917, not returning until March following, and that on December 12, 1916, *Sattler* and *H. M. Levy* each was credited on the books with $6,700, the credit being made up in each case of moneys theretofore advanced by him to the company, $2,000 salary theretofore voted for the year, and $1,916 being his share of the net profits and surplus for the year, and that on January

2, 1917, a debit of $6,700 "capital stock" was entered on each account, which amounted to payment for sixty-seven shares of the previously unissued stock.

Further findings of the court were to the effect that on January 6, 1917, it was agreed by the plaintiff and *Sattler* and *H. M. Levy* that the bonus to be paid by the plaintiff for his stock should be $900; that on January 24th the plaintiff paid $5,000 in cash for his fifty shares of stock directly to the corporation; that on February 15, 1917, *H. M. Levy* opened an account on the ledger denominated "A. J. Levy Capital Account," entering a debit charge thereon of $5,000 for fifty shares; that on January 6, 1917, the defendant *Sattler* made a written assignment of fifty shares of his stock to the defendant *Brin,* his son-in-law, which assignment was entered on the books of the corporation, and that immediately after this transfer a stockholders' meeting was duly held at which *Sattler, H. M. Levy, Trevett,* and *Brin* were elected directors of the corporation, and said *Brin* has since acted as such; that in March, 1917, plaintiff was informed of the subscriptions of *J. B. Sattler* and *H. M. Levy* for the unissued $25,000 of stock and that there had been assigned to him fifty shares without any subscription rights attached thereto, and accepted said fifty shares as transferred to him on the books of the corporation, and that the plaintiff then became advised that *Brin* had been elected director and was assuming to act as such; that certificates of stock with stubs in accordance with the holdings and transfers hereinbefore set forth were made out and signed by *H. M. Levy* in June, 1917, but, although approved by the president, were never signed by him nor delivered, except that *Trevett* has received a certificate for his original fifty shares; that a directors' meeting was held in July, 1917, at which *Trevett* resigned as vice-president and *Brin* was unanimously elected to the office; that the defendants *J. B. Sattler* and *H. M. Levy* acted in good faith in said transactions and in good faith believed themselves entitled to subscribe for the additional shares of

stock which they took over and above the original $25,000 of full-paid stock held by them, but that *Trevett* had no knowledge of their action and never waived his right to participate in the subscription for stock unissued prior to January 1, 1917; and that in October, 1917, *Trevett,* learning of the subscriptions of *Sattler* and *H. M. Levy* for the unissued stock and their subsequent transactions, brought action for relief against them and the corporation, which action was settled by agreement between *Trevett* and the board of directors in December, 1917, in which he *(Trevett)* ratified the various transactions and was given the right to subscribe for forty-six of the remaining sixty-six unissued shares of stock.

The trial court concluded from these facts that *Sattler* and *H. M. Levy* lawfully own 167 shares each of the capital stock and are each entitled to subscribe for twenty-five additional shares of unissued stock; that the plaintiff on January 24, 1917, became the owner of fifty shares of the additional stock (over and above the 250 shares originally outstanding), and by his acts has estopped himself from claiming otherwise; that *Brin* has been since January 6, 1917, a director of the company; that *Trevett* is entitled to subscribe for forty-six additional shares of the unissued stock of the company in accordance with the agreement of settlement aforesaid; and that the complaint of the plaintiff should be dismissed.

The defendant *H. M. Levy* by answer interposed a cross-complaint against his codefendants, attacking the validity of the various transactions connected with the issuance of all shares of stock not included in the 250 shares originally issued, and asking that such transactions be set aside. This cross-complaint was also dismissed on the merits. The plaintiff and the defendant *H. M. Levy* both appeal.

For the appellant *Adolph Levy* there were briefs by *Flanders, Fawsett & Smart* of Milwaukee, and oral argument by *Edward M. Smart.*

For the respondents *Sattler, Brin,* and the *Milwaukee*

Knitting Company there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee; for the respondent *Trevett* a brief by *Charles F. Puls, Jr.*, of Milwaukee; and the cause was argued orally by *Nathan Glicksman.*

WINSLOW, C. J. The evidence in the case is voluminous, and the briefs discuss many questions which we do not find it necessary to consider. The fundamental question in the case is, in our judgment, a question of fact pure and simple, and that question is whether the agreement of August, 1916, between the plaintiff on one side and the defendants *Sattler* and *H. M. Levy* on the other was that said defendants would each sell to the plaintiff twenty-five shares out of the 250 shares which said defendants had already paid for, or twenty-five shares of the so-called treasury stock, not yet issued or paid for, but which said defendants had agreed between themselves to take.

There was, of course, a considerable difference between the character and value of the two propositions. Under the first proposition the plaintiff would secure fifty out of 250 shares, or a one-fifth interest in the corporation, with the resulting right to take his proportionate share of any stock subsequently issued, thus preserving his voting power intact; under the second proposition he would simply acquire fifty shares of stock without the right to participate in any issues of stock made before his agreement of purchase was carried out. *Luther v. C. J. Luther Co.* 118 Wis. 112, 94 N. W. 69; *Dunn v. Acme A. & G. Co.* 168 Wis. 128, 169 N. W. 297. Had a stock book been kept with stubs and certificates issued as stock was subscribed, there would probably be little difficulty in deciding the question, but this was not done, and the only record of stock transactions is contained in the capital and stockholders' accounts in the books of account.

The trial court very distinctly found, however, as we read the findings, that the agreement between the parties was that the plaintiff was to receive fifty shares of the unissued stock

still in the treasury and not any part of the original 250 shares which *Sattler* and *H. M. Levy* had paid for. A very ingenious argument was made by appellant's counsel to the effect that the findings should be construed as finding that the contract was to sell the latter class of stock, but it fails to convince us, especially in view of the conclusions of law reached by the court, which could not be justified if the facts were found as claimed by the appellant. The testimony in support of this finding was amply sufficient to sustain it; certainly it cannot be said that it is against the preponderance of the evidence. The initial conversation on the subject between *Sattler* and the plaintiff took place at Duluth, where the plaintiff was engaged in business, in the summer of 1916. *Sattler* testifies positively that he stated to the plaintiff that the total capitalization was $50,000, of which $25,000 was paid up; that he proposed to sell him twenty-five shares of the treasury stock, and that if his brother would also sell him twenty-five shares that would give him fifty shares; that no stock was to be turned over till after New Years, after inventory was taken and the amount earned on the paid-up stock ascertained, and that such bonus should be paid on the twenty-five shares sold when they were turned over in 1917; that there was $25,000 in the treasury, and that he had subscribed $12,500 of the treasury stock and *H. M. Levy* $12,500. Two apparently disinterested witnesses who were present during all or a part of the conversation corroborated *Sattler's* testimony quite satisfactorily. This conversation was preliminary only, and in pursuance of it the plaintiff came to Milwaukee and made the final oral arrangement August 16, 1916, at which time he saw and talked with both *Sattler* and his brother, *H. M. Levy*. *Sattler* testifies that at this time the plaintiff, after talking with his brother, distinctly stated that he accepted the proposition. The plaintiff and his brother testified in substance that a proposition was then made to the plaintiff that he buy twenty-five shares of stock from *Sattler* and a like amount

from his brother, *H. M. Levy,* at par, with a bonus based on profits declared for 1916, and to enter into service as a salesman December 1, 1916. This in substance is the direct testimony on the subject. It appears further, however, that when the plaintiff paid for his stock, January 24, 1917, the amount was paid directly into the treasury of the company and not to *Sattler* and *H. M. Levy* individually, as would naturally be the case if the stock purchased by the plaintiff was paid-up stock owned by them. The entries on the books of account point rather to this view of the transaction than to the other, and we find that *H. M. Levy,* in a deposition taken under sec. 4096, Stats., before trial of the case, testified as follows with regard to the entries made by him on the books:

"*Q.* And in undertaking to make your brother a stockholder you caused to be transferred to him fifty shares of stock that had heretofore been unissued? *A.* Yes, sir. *Q.* And that was done, as your books show, upon the assumption that you and *Mr. Sattler* were entitled to all the stock that had been unissued? *A.* Yes, sir."

It will be remembered that prior to January 24, 1917, the defendants *Sattler* and *H. M. Levy* had, by charging up to themselves certain credits for salaries and advances, paid for 134 additional shares of stock, the same being divided equally between them. The court expressly found that these shares of stock were paid for January 2, 1917, and also that the defendants acted in good faith in these various transactions, and we are unable to say that these findings are not supported by the evidence. No certificates were in fact issued at the time, but of course *Sattler* and *H. M. Levy* owned the stock notwithstanding that fact. In legal effect it was issued when fully paid for. The certificate is simply evidence of the essential fact, not the fact itself.

There were therefore in existence at the time the plaintiff took his stock 434 shares of paid-up stock and none has been

issued since. The plaintiff has precisely the same voting power now that he had when he took and paid for his stock.

It is true that the defendant *Trevett* had not been consulted with reference to the issuance of the additional stock to *Sattler* and *Levy* nor had he been offered an opportunity to take his share of the new issue, an opportunity to which he was entitled under the *Luther Case,* above cited. In this question, however, only *Mr. Trevett* himself was interested, and he has obtained a satisfactory adjustment of his claims by the agreement of settlement in the action brought by him, and thus the matter drops entirely out of consideration.

The court further found that in March, 1917, the plaintiff was fully informed of the subscription attempted to be made by *Sattler* and *H. M. Levy* for the unissued stock and that the fifty shares assigned and transferred to him had no subscription rights attached thereto, and with that knowledge assented to the transaction and accepted the shares transferred to him on the books of the corporation as the stock purchased by him. This finding is supported by sufficient evidence and seems entirely sufficient to fix the rights of the parties even if the terms of the original agreement were in doubt.

These conclusions really dispose of the case. The trial court having found on sufficient evidence that *Brin* became a stockholder on January 6, 1917, the objections raised by plaintiff to the legality of his election as director and vice-president practically disappear. No actual fraud or mismanagement of the affairs of the corporation is alleged, and the judgment must be affirmed.

By the Court.—Judgment affirmed, with one bill of costs to the respondents to be taxed against the plaintiff appellant.

ESCHWEILER, J., dissents.

ESTATE OF WEEK: STATE and another, Appellants, vs. ANDERSON and others, Respondents.

April 2—May 27, 1919.

Taxation: Inheritance taxes: Imposition by state and by federal government: Basis for computation: Deduction of federal estate tax: Deduction of expenses of administration: Statutes: Executive construction.

1. Both federal and state governments may impose a tax upon the transfer of property at death. Such taxes may be levied by both governments in the exercise of the power of reasonable regulation and taxation of transfers of property.
2. The basis of the inheritance tax is not inherently and necessarily the value of the property. The legislature may fix any arbitrary basis for its computation. It has made such basis the clear market value of the property as of the instant of death.
3. The statute neither expressly nor impliedly provides for any deductions from such value as a basis for the computation of the inheritance tax.
4. The so-called federal estate tax provided for by sec. 201 of the act of Congress of September 8, 1916 (39 U. S. Stats. at Large, 756, ch. 463), should not be deducted from the value of the estate in computing the amount of the state inheritance tax.
5. The state inheritance tax law having for twenty years been construed by county courts and administrative officers, with the acquiescence of the legislature, to allow the deduction of expenses of administration in determining the amount of the tax, has received a practical construction which only the legislature should change, notwithstanding such deduction is not expressly authorized by the act itself.

APPEAL from a judgment of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Reversed.*

The appeal is from a judgment affirming the judgment of the county court in determining the amount of inheritance taxes assessable against the estate of Andrew R. Week, deceased.

For the appellants there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *J. R. Pfiffner,* district attorney, and oral argument by *Mr. Brossard* and *Mr. Pfiffner.*

For the respondents there was a brief by *Fisher & Cashin* of Stevens Point, and oral argument by *W. E. Fisher.*

A brief was also filed and the cause argued orally by *Samuel D. Hastings* of Green Bay.

OWEN, J. The county court found that the value of the gross estate was $491,112.56. Deductions from the gross estate were made for debts, funeral expenses, expenses of administration, and the federal estate tax, aggregating $47,569.28. A claim for deduction on account of an inheritance tax paid to the state of Illinois was disallowed by the county court. The amount of the federal tax deducted was $17,940. Appellants contend that this amount was improperly allowed, and the sole question involved is whether, in determining the value of an estate for the purpose of computing the inheritance tax due this state, the federal inheritance tax should be deducted. The federal inheritance, or, as it is called, estate tax, is provided for by sec. 201 of an act of Congress entitled "An act to increase the revenue, and for other purposes," approved September 8, 1916 (39 U. S. Stats. at Large, 756–780, ch. 463). The act imposes a tax, at graduated rates, upon the value of the net estate, makes it the duty of the executor, administrator, or trustee to pay the tax, creates a lien upon the property until the tax is paid, and makes provision for the foreclosure of such lien in the event it is not paid. The tax is levied upon the entire mass of property passing from the deceased at a rate graduated in proportion to the amount of property constituting the estate, but not varied according to the kinship of the legatees, devisees, or successors in title.

If the federal estate tax, so called, should be deducted in ascertaining the amount upon which the inheritance tax of this state is to be computed, it must be by force of our own statutes. There is no question here of the right of Congress to impose the tax, nor is there any question of a conflict between, or precedence of, federal and state statutes. It is

conceded that both the federal and state governments may impose a tax upon the transfer of property at death. Such taxes may be levied by both governments in the exercise of the power of reasonable regulation and taxation of transfers of property. *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627; *Knowlton v. Moore,* 178 U. S. 41, 20 Sup. Ct. 747. The right of each jurisdiction in such respect is untrammeled and uninfluenced by the exercise of the right by the other. The exercise of the right by Congress subsequent to the enactment of our own statute can have no influence upon the amount of taxes imposed by this state or upon the amount upon which they shall be computed, unless it is by force of some provision of our own statute.

The question, therefore, is this: Does our statute provide for the deduction of the federal estate tax in ascertaining the amount upon which the state inheritance tax shall be computed? There is no express provision to that effect. Is one implied? Our inheritance tax law was enacted pursuant to the power of the legislature to reasonably regulate transfers of property and business transactions, as stated in the *Nunnemacher Case.* It is a tax imposed on a transaction, the transaction being the passing of property from the dead to the living. It is not a tax upon the property itself, and, consequently, neither the property nor the value thereof necessarily and inherently constitutes the basis for the amount of the tax. The tax being based on a transaction, however, some basis must be fixed by the legislature by which the tax shall be determined. The legislature has made such basis the clear market value of the property at the time of the transfer. The transfer contemplated occurs at the instant of death. *State v. Pabst,* 139 Wis. 561, 121 N. W. 351. There is no provision made in the statute for any deductions from the value of the estate as it may be determined to be as of the date of the death of the deceased, and we see no warrant for reading into the statute provisions for the deduction of any amount which the legislature did not

see fit to insert. The legislature having the power to impose a tax upon the passing of property from the dead to the living, had the exclusive power of determining the method by which the amount of the tax should be ascertained. It having done so in what we think to be unambiguous language, there is no room for construction. A different conclusion might be necessary if our tax were computed upon the value of the property finally, and as of the time of, passing to the legatee or devisee. It was this consideration which largely influenced the conclusions announced in *People v. Pasfield,* 284 Ill. 450, 120 N. E. 286; *Corbin v. Townshend,* 92 Conn. 501, 103 Atl. 647; *Roebling's Estate* (N. J.) 104 Atl. 295; *Knight's Estate,* 261 Pa. St. 537, 104 Atl. 765; and *State ex rel. Foot v. Bazille,* 97 Minn. 11, 106 N. W. 93, where it was held that the federal estate tax should be deducted in computing the state tax.

There may be some difficulty in reconciling this conclusion with the prevailing practice of deducting expenses of administration. We realize that our logic would lead to a rejection of such deductions. We have no disposition, however, to disturb the practice that has uniformly prevailed. We took the practice with the law from New York. *State v. Pabst,* 139 Wis. 561, 121 N. W. 351. The construction placed upon the law in this respect by the courts of New York having been followed by the county courts and administrative officers of this state, with the acquiescence of the legislature, for upwards of twenty years, evidences a practical construction which only the legislature should change.

By the Court.—The judgment of the circuit court is reversed, and cause remanded with instructions to reverse the judgment of the county court and with directions to disallow the deduction of the amount of the federal estate tax.

ESCHWEILER, J., dissents.

PEDERSON, Respondent, vs. JOHNSON, Appellant.

April 3—May 27, 1919.

Brokers: Duty to inform principal: Fraud of broker: Contract: Right of principal to earnest money: Liability to principal: Agreement with subagent: Commissions: Performance of services: Principal and agent: Duty of agent: Taking advantage of relationship: Appeal: Technical objection: Review: Harmless error: Immaterial findings.

1. In an action by a principal to recover from a defendant broker earnest money forfeited by the purchaser, a finding that defendant was to receive $1,000 for his services is immaterial, where defendant never sold plaintiff's premises and therefore never became entitled to a commission.
2. Where the purchaser under an earnest-money contract in fact paid $1,000 in discharge of his liability, the contention that the court erred in finding that the $1,000 draft deposited by the purchaser as earnest money was paid is technical and without merit, it being immaterial whether the draft was taken up and canceled.
3. Though the defendant broker with whom plaintiff had listed property for sale or trade procured plaintiff's signature to the earnest-money contract under which the purchaser agreed, in case of default, to forfeit such earnest money to defendant, it is *held* that defendant was liable to plaintiff for the amount of earnest money forfeited by the purchaser, the insertion of the clause for defendant's own benefit being unauthorized and plaintiff's signature being procured by fraud.
4. All profits made and advantage gained by an agent in the execution of the agency belong to the principal, whether the result of the performance or of the violation of a duty of the agent, if the fruit of the agency.
5. The fact that the broker had agreed to pay to another a part of the commissions which he was to receive in no way affected his liability to his principal for earnest money forfeited by the buyer and to which the principal was entitled.
6. The broker being an agent to sell and not merely to procure a purchaser ready, able, and willing to purchase, his right to compensation was dependent upon a sale.
7. An agent may not take advantage of the confidential relationship existing between himself and his principal for his own benefit, even though the principal is not injured thereby.

8. Though an agent is to sell at a fixed price it is his duty to keep his principal fully informed, and if he knows that more advantageous terms can be obtained he is under obligation to communicate the facts in reference thereto to his principal, and is liable for failure so to do.

APPEAL from a judgment of the circuit court for Polk county: FRANK A. Ross, Circuit Judge. *Affirmed.*

The plaintiff is a farmer and entered into a contract of agency with the defendant, a real-estate broker, which contract, after describing the property and the amount of incumbrance thereon, recited:

"Lowest price and terms of sale $20,500. This is to certify that I have listed the above described land with *Henry Johnson* for sale or trade for a period of twelve months, and I agree to pay five per cent. commission out of first money received on sale.

"Dated November 23, 1915. JENS P. PEDERSON."

On February 10, 1916, the defendant, in the name of his principal, entered into a so-called earnest-money contract of sale, which acknowledged the receipt from one A. R. Mudge of $1,000 "as earnest money and in part payment for the payment of the following described property," describing the same property described in the option, "which I have this day sold and agreed to convey to the said A. R. Mudge for the sum of $20,500 on terms as follows, viz.: $1,000 in hand paid as above and $8,000 or more on or before March 1, 1916; $3,000 to be settled by mortgage on above described land; $8,500, now a first mortgage, to be assumed by purchaser, with interest," etc. The option then recited other agreements and continued:

"And it is agreed that if the title to said premises is not good and cannot be made good within thirty days from date when first payment shall become due, this agreement shall be void, and the above mentioned thousand dollars ($1,000) refunded. But if the title to said premises is then good, in

the name of grantor, and said purchaser refuses to accept the said same thousand dollars ($1,000) shall be forfeited to *Henry Johnson* as liquidated damages.

"JENS P. PEDERSON,
"By Henry Johnson, Agent."

A few days later the defendant secured the plaintiff's signature to a copy of the contract of sale under circumstances found by the trial court as follows:

"I further find that said plaintiff was not, either at the time of signing said Exhibit 4 [copy of earnest-money contract] nor at any time prior thereto, able to write and read the English language, and that the said defendant did not in any manner read or explain the terms of said Exhibit 4 to said plaintiff, but, on the contrary, told said plaintiff that the paper which defendant then signed and there requested said plaintiff to sign was a paper which was necessary to be signed to close the deal and which paper was to be sent to said Mudge to effect that purpose, and that said plaintiff, relying upon the statements thus made to him by said defendant, signed said paper and not otherwise."

This finding is not assailed. The $1,000 was paid to the defendant by means of a draft, which was deposited for collection and thereafter protested. The draft was indorsed by one Peltier, a subagent of the defendant, who then went to Minnesota, the home of the purchaser, procured the payment of the $1,000, returned with the money, paid $600 of it to the defendant, and retained the $400 for himself as claimed compensation for his services as subagent. The purchaser forfeited the earnest money and was released from the contract. Some time afterwards the plaintiff discovered the fact that $1,000 had been paid on account of the contract and made demand for payment thereof to him, and, upon the defendant's refusal to pay, brought this action to recover the $1,000. The case was tried by the court without a jury. The court found the material facts as stated and other facts, and upon such findings the plaintiff had judgment for $1,000, from which judgment the defendant appeals.

For the appellant there was a brief by *Kennedy & Yates* of Amery, and oral argument by *W. T. Kennedy.*

For the respondent there was a brief by *McNally & Doar* of New Richmond, and oral argument by *W. T. Doar.*

ROSENBERRY, J. The defendant contends that the court erred in finding that he was to receive $1,000 for his services as agent, and contends that the court should have found that he was to receive five per cent. commission on the sale price of $20,500. This finding we consider wholly immaterial in any aspect of the case. The defendant never sold the premises and never became entitled to any commission.

Defendant's next contention is that the court erred in finding that the draft was paid. This is purely technical and has no merit. Whether the draft itself was in fact taken up and canceled is immaterial. The purchaser under the earnest-money contract of sale paid the $1,000 to Peltier on account and in discharge of his liability under the earnest-money contract. That fact is undisputed.

The third contention of the defendant is stated by counsel as follows:

"The particular clause in the contract relating to the forfeiture of the $1,000 to *Henry Johnson* as liquidated damages the plaintiff testifies that he knew nothing about, had never authorized, and never agreed to. If this is true, then the plaintiff was not bound by Exhibit 3 [earnest-money contract], neither would he have any interest whatever in the $1,000, and the disposition of the $1,000 would be wholly a matter between the defendant and purchaser, unless the plaintiff thereafter ratified and agreed to this contract. On the other hand, if the plaintiff had ratified and agreed to this contract, then the plaintiff agreed that the $1,000 should be forfeited to *Henry Johnson* as liquidated damages."

This argument sounds remarkably like the ancient maxim of "Heads I win, tails you lose." If the principal ratifies the contract, the earnest money, if forfeited, belongs to the agent by the terms of the contract; if he does not ratify, he

has no interest in it. The argument ignores the fact that an agent must be loyal to his principal and act with the utmost good faith. No question as to the ratification of the contract arises in this case. Long before the plaintiff knew of that part of the contract which provided that the purchaser could forfeit the $1,000 and be released from the contract the $1,000 had been paid and the contract was at an end and was incapable of ratification.

The claim of the defendant that the signature which he procured under the circumstances found by the trial court authorized him to retain the $1,000 is without any merit for the reason that it was obtained by fraud and misrepresentation; so the case must stand upon the original contract as made by the defendant.

From the facts it appears clearly that the defendant, as the agent of the plaintiff, by inserting the forfeiture clause dealt with the property of his principal in a manner unauthorized by the contract of agency; that without authority he inserted in the contract of sale a clause for his own profit, and now seeks to retain the benefit of his misconduct. No principle in the law of agency is better settled than that the agent may not deal in the business of his agency for his own benefit. All profits made and advantage gained by the agent in the execution of the agency belong to the principal, and it matters not whether such profit or advantage is the result of the performance or of the violation of a duty of the agency if it be the fruit of the agency. All profits and every advantage beyond lawful compensation made by an agent in the business, or by dealing or speculating with the effects of his principal, though in violation of his duty as an agent, and though the loss, if one had occurred, would have fallen on the agent, will, wherever they can be regarded as the fruit or outgrowth of the agency, be deemed to have been acquired for the benefit of the principal. These elementary principles, stated in the language of one of the most learned writers on agency (1 Mechem, Agency (2d ed.) §§ 1191, 1224, 1225),

are supported by the great weight of authority in every jurisdiction.

"The doctrine is not based on the idea that the transaction is necessarily an injury to or a fraud upon the principal, but on the idea of closing the door to temptation to fraud and keeping the agent's eye single to the rights and welfare of his principal. And the interdiction is enforced with a strong hand in courts of justice." 21 Ruling Case Law, 830, § 13. See, also, "Duties and Liability of Agent to Principal," 2 Corp. Jur. p. 692, § 353.

The fact that the defendant did not authorize the making of the contract whereby the earnest money of $1,000 might be forfeited and paid to the agent and the purchaser relieved from the contract, instead of freeing the agent from liability, as claimed by the defendant, brings him clearly within the rule stated and makes him liable. The fact that the defendant had agreed to pay out to another person a part of the commission which he was to receive in no way affects his liability to his principal. *Grant v. Hardy,* 33 Wis. 668.

The defendant was not a middleman; he was an agent pure and simple so far as a sale was concerned. The duties of the defendant were not limited by his contract to finding and procuring a purchaser ready, able, and willing to purchase and to bring his principal and such purchaser together. He was an agent to sell, and his right to compensation was dependent upon a sale. *Langford v. Issenhuth,* 28 S. Dak. 451, 134 N. W. 889; *Synnott v. Shaughnessy,* 2 Idaho, 111, 7 Pac. 82.

Under the contract it was the defendant's duty to secure the best possible price for plaintiff's property. The fact that $20,500 was fixed as the lowest price, that is, as the price below which the plaintiff would not sell, brings this case squarely within the exception laid down in *Tasse v. Kindt,* 145 Wis. 115, 118, 128 N. W. 972:

"If the plaintiff occupied a position which required diligence in obtaining as high a price for the defendant's land as possible, or if the contract between the parties were such

as to render the contract of the plaintiff with the purchaser at variance with his duty to the defendant [as agent], a very different question would be presented."

This court has been very liberal in permitting an agent representing both parties to recover compensation for services from each, but it must not be inferred that there has been any relaxation of the rule, even as to brokers or middlemen, requiring agents to be loyal to their principal and to act with the utmost good faith. The liability of an agent to his principal arises out of a breach of duty which may fall far short of positive fraud. An agent may not take advantage of the confidential relationship existing between himself and his principal for his own benefit even though the principal is not injured thereby. 2 Mechem, Agency (2d ed.) § 2411; *Sterling E. & C. Co. v. Miller,* 164 Wis. 192, 159 N. W. 732; *Collins v. Case,* 23 Wis. 230; 9 Corp. Jur. 537, § 39; *Bassett v. Rogers,* 165 Mass. 377, 43 N. E. 180.

Even an agent to sell at a fixed price is in duty bound to keep his principal fully informed of all material facts in reference to the transaction, and if an agent knows that more advantageous terms can be obtained he is not only under a moral but a legal obligation to communicate the facts in reference thereto to his principal, and he is liable for his failure so to do. *Snell v. Goodlander,* 90 Minn. 533, 97 N. W. 421; *Carter v. Owens,* 58 Fla. 204, 50 South. 641, 25 L. R. A. N. S. 736. See note and cases cited to *Holmes v. Cathcart* (88 Minn. 213, 92 N. W. 956), 60 L. R. A. 734, and cases cited in 6 L. R. A. Annotations, 688.

The unauthorized contract with reference to the property of the principal made by the agent in this case, whereby he sought to obtain in the execution of his agency a benefit for himself, brings the defendant squarely within the principles above set out and makes him liable to the plaintiff for the amount of the earnest money forfeited by the purchaser.

By the Court.—Judgment affirmed.

LEHAN, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

April 29—May 27, 1919.

Carriers: Ejection of passenger from train: Negligence: Issues: Knowledge of event: Evidence: Sufficiency: Res gestæ: Hearsay: Declarations of agents: Production of reports and statements: Appeal: Findings of jury: Weight on review.

1. In an action for injuries sustained by plaintiff while being ejected from defendant's passenger train, where plaintiff called defendant's claim agent at the trial as an adverse witness, who without objection gave the names of witnesses with whom he had talked and stated that he possessed written reports by defendant's local physicians, his compelled testimony, based on such reports and interviews, that he understood that two of defendant's physicians had treated plaintiff and that he presumed that defendant had paid for such treatment was hearsay and inadmissible.
2. Statements of defendant's witnesses to its claim agent and written reports by defendant's local physicians, sought to be produced and used, either as of employees of defendant or of persons in no wise connected with it, were no part of the *res gestæ*.
3. Nor were such statements admissible as tending to show notice to defendant of the happening of the event, there being no such issue in the case, or as being in the nature of declarations of any person who could thereby bind defendant.
4. Such documents, then in the possession of defendant's claim agent, were not admissible as evidence in plaintiff's behalf, nor were they documents which the party holding them should be required to produce at the desire of the other party.
5. The supreme court will attach great weight to the findings of a jury on questions of fact submitted to them, and, where they are supported by credible evidence, they will not be reversed.
6. On the evidence in this case and in view of the manner in which the trial was conducted, it is *held* that the verdict for plaintiff was the result of passion or prejudice and against the overwhelming testimony, and cannot stand.

APPEAL from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Reversed.*

This action was brought for personal injuries claimed to have been received by plaintiff while being ejected from one

of defendant's passenger trains at Rhinelander, Wisconsin, on October 16, 1916, at about 11 o'clock p. m.

Defendant admitted the purchase by plaintiff of a ticket for passage on its train from Rhinelander to Appleton Junction, and by way of answer alleged that when plaintiff presented himself as a passenger to board the train he was intoxicated and under the influence of liquor; that he was refused entrance to the train by the defendant's employees, and that in spite of such refusal he forced his way on to such train, and that immediately thereafter the train was stopped and the plaintiff, carefully and without unnecessary force and without injury to him, lawfully removed and ejected from the said train, the sole reason being his intoxicated condition.

Upon the trial the defendant was permitted to amend its answer by alleging as an additional reason in justification for the ejection of the plaintiff the alleged fact that the plaintiff while upon said train used violent, abusive, profane, and indecent language, and for which use the plaintiff was lawfully removed and ejected without injury from the train.

The substance of the special verdict and the answers returned by the jury thereto were as follows:

(1) The defendant company accepted the plaintiff as a passenger on its train on the night in question.

(2) The plaintiff was not intoxicated when he entered upon the train.

(3) He did not use and utter abusive, profane, and indecent language while upon said train.

(4) The defendant's employees used excessive force upon plaintiff in causing his ejection.

(5) The defendant's employees did not use proper care in causing his ejection.

(6) The plaintiff sustained injuries to his person while on and being ejected from the train.

(7) Such injuries were caused by the act or omission of defendant's employees.

(8) The amount assessed for plaintiff's damages was $8,000.

From a judgment thereupon in favor of the plaintiff, defendant has appealed.

R. N. Van Doren of Milwaukee, for the appellant.

For the respondent there was a brief by *Martin, Martin & Martin* of Green Bay, and oral argument by *Joseph Martin.*

ESCHWEILER, J. On the trial the plaintiff called as an adverse witness defendant's claim agent who had investigated this case and obtained written statements from various persons. He testified, apparently without objection being interposed, giving the names and addresses of the witnesses with whom he had talked and that he had in his possession written reports made by the local physicians of the defendant company at Rhinelander and Appleton. Demand was made by plaintiff's counsel for the production of the report of the physician at Rhinelander, but that, on objection, was refused. He was then compelled to answer over objection that, based upon such report, he understood there had been a treatment by the company's doctor of the plaintiff and gave the number of days of such treatment. Also further, that from knowledge obtained only by interviews with the physician at Appleton he was again permitted to testify as to plaintiff's treatment by that physician, and that he presumed the defendant had paid the bill for such treatment, and then, over vigorous protest and objection on the ground that such method of examination was eliciting hearsay, incompetent, and irrelevant testimony, he was still further required to testify as to such matters.

All this was hearsay and there was nothing of material, relevant, or competent testimony on the issues that was obtained or could be obtained from this witness through all of his protracted examination. It should have been promptly and firmly halted by the trial court when the objections were interposed. Permitting the examination of the witness to

proceed in the manner in which it was being conducted could very well have a prejudicial effect upon a jury.

Plaintiff's counsel further demanded, at the time of the examination of other witnesses called by the defendant, for the production of the statements made by such witnesses respectively to the claim agent. Upon cross-examination of O'Brien, the city policeman, and one of such witnesses, such demand was stated to be for the purpose of cross-examination. Upon refusal of defendant's counsel to produce it on the ground that it was not a proper matter of evidence the court stated, "I don't see how I can compel them to produce it." After such ruling and further refusal to produce such statement the witness was then asked as to whether he had not told the claim agent that the plaintiff, in witness's opinion, was not drunk at the time in question, and over objection the question was in substance repeated, thereby in effect assuming that the witness had so stated in such report.

To better show the method of examination pursued and permitted with reference to two other of defendant's witnesses not employees, it is necessary to set forth from the record as follows:

"Mr. Martin: At this time I ask the defendant to produce the statement which it has got now in its possession—the statement given by this witness [Chris Rouman] October 20th.

"Mr. Van Doren: I decline to produce it.

"Mr. Martin: *Q.* Do you think, if you got that statement, it might help you to clear up things in your mind any?

"Objection as improper. Sustained. Exception.

"*Q.* Do you want that statement to look—do you want that statement which you made October 20th last and gave to Mr. Dockery, to enable you to recall the facts and circumstances better than what you probably can without?

"Objection as an improper question; the witness has not indicated any desire for that. Objection overruled. Exception.

"*Q.* Would you like to have the statement for that purpose? *A.* Well, I don't know.

"*Q.* Do you want it now to look it over? *A.* It makes no difference to me.

"*Q.* You think that everything is just as clear in your mind today as it was on the 20th of last October? *A.* I will say this: I may have forgotten some; it is quite a while ago since this happened.

"*Q.* Of course you know that the case is being tried now, and it is quite important that you tell us everything as accurately as you can. *A.* Well, I told the best I could remember.

"*Q.* And you don't seem to want to have your memory refreshed?

"Objection to that method of examination as improper; objection as not proper.

"*Q.* You don't seem to want to have your memory refreshed by reference to that typewritten statement which counsel has got, do you?

"Objection as improper. Sustained. Exception.

"Court: If the witness were an employee of the railway company you would be entitled to it."

None of these documents, statements, or reports thus sought to be produced and used, either as of employees of defendant or persons in no wise connected with it, were in any manner part of the *res gestæ,* nor could they be received as tending to show notice to the defendant of the happening of the event, for no such issue was in the case. They were not in the nature of declarations of any person who could thereby bind the defendant. *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 212, 99 N. W. 366; *Zentner v. Oshkosh G. L. Co.* 126 Wis. 196, 201, 105 N. W. 911; *Warner v. Maine Cent. R. Co.* 111 Me. 149, 88 Atl. 403.

Whether these reports or statements, or any of them, should be classed as privileged communications, as some authorities hold *(Ex parte Schoepf,* 74 Ohio St. 1, 77 N. E. 276; *Cully v. N. P. R. Co.* 35 Wash. 241, 77 Pac. 202), it is not necessary to decide. They were not admissible as evidence in plaintiff's behalf of any facts therein recited, nor were they documents which the party holding them should be

required to produce at the desire of the other. *Powell v. N. P. R. Co.* 46 Minn. 249, 48 N. W. 907; *Wabash R. Co. v. Farrell,* 79 Ill. App. 508; *Davenport Co. v. Pa. R. Co.* 166 Pa. St. 480, 31 Atl. 245; *Carroll v. E. T., V. & G. R. Co.* 82 Ga. 452, 106 S. E. 163; *Atchison, T. & S. F. R. Co. v. Burks,* 78 Kan. 515, 96 Pac. 950, 18 L. R. A. N. S. 231, note.

It is as legitimate and proper for a defendant to interview persons who may be acquainted with the facts and circumstances surrounding the subject matter of a litigation as it is for a plaintiff to pursue the same methods. Statements and information of the nature of the ones before us in this case, when obtained by either party to an occurrence which may result in a lawsuit, are not proper or legitimate evidence for the other party as to facts therein recited, and an opposing party has no right to compel the production of such statements nor to question the person who may have obtained them as to the contents of such statements. They are no more subject to compulsory production at the demand of the opposite party on the trial, when made by witnesses produced at the trial, than would be such statements made by persons not called as witnesses. Such persistent attempts as were made in this case to drag in such matters before the jury are more than likely to have a prejudicial effect and to result in a miscarriage of justice.

With the verdict that is before us upon the evidence in the record, such errors would have been sufficient to require a reversal of this judgment.

The plaintiff's own testimony in this case disclosed that at the time in question he was a man of about thirty-one years of age, weighing about 200 pounds, at one time engaged in railroading, but for some time a bartender; that he had arrived at Rhinelander at about 2 o'clock in the afternoon of that day for the purpose of seeking employment, and had spent the afternoon and evening, except for the time necessary for supper, in various saloons, and had drunk during that period ten small glasses of beer and about two glasses of

whisky; that he purchased his ticket from the ticket agent a few moments before the train was ready to depart and without any protest or objection from said ticket agent as to his condition or right to enter the train; that he stood upon the platform after the train had arrived and near the smoker with a brother-in-law of his and also with one O'Brien, the city policeman who was on duty at the depot that night; that just before the train was ready to leave the plaintiff was given a small flask of whisky by his brother-in-law to take with him to give to his father-in-law, with whom plaintiff then made his home in Appleton; and that he was sober at the time he was ready to enter the train.

He further testified that no objection was made by any one to his getting upon the train, and that he entered the smoking car and had seated himself in a seat in the rear end when the brakeman, whom the plaintiff had never seen or spoken to before, came up to him and said, "G—— d—— you, you can't ride this train;" that at the same time, the train having started, the conductor came forward from the front end of the smoking car without stopping on his way to take tickets from any of the passengers in the coach and joined with the brakeman, saying the same thing as the brakeman had just said; that the brakeman said also, "You are drunk, G—— d—— you, you can't ride this train;" that plaintiff showed him the ticket he had purchased and told the brakeman that he, the brakeman, was crazy; that the brakeman said, "I don't give a G—— d—— whether you have a ticket or not;" that when the conductor came he also said that he didn't give a G—— d—— whether the plaintiff had a ticket or not, he would have to get off the train; that the conductor had not said a word to plaintiff before this; that he was forced out of the door of the smoker and then they let go of him. Plaintiff then started to back down the steps and told the brakeman and conductor to stop the train, that he would get off; that the conductor stopped it just as it was pulling out of the depot; that as he stepped off backwards down the

steps of the smoker, holding a small handbag in one hand and on to the side handles of the car intending to step off as soon as the train stopped, and without his saying anything further, the brakeman, standing on the platform of the smoker facing him, kicked the plaintiff three times, first in the testicles and then in the stomach; that he then fell to the ground upon the handbag he was carrying; that he is uncertain as to whether the train had then actually stopped or not; that he used vile and obscene language after being so ejected. The policeman O'Brien then came up towards him and he walked back with the policeman to the station and at first demanded his money back for his ticket but subsequently determined to retain the ticket. He then started out of the station, and upon the platform outside the door he collapsed or fell over, complaining then of having been injured in his private parts, having spoken before that on his way to the window of having been injured in the abdomen.

He was taken to the city hall and there attended by physicians, and subsequently to the hospital at Rhinelander, and after two days' stay there was taken by defendant's physician, who was then attending him, in his automobile to the depot, and from there went to his home in Appleton. Here he was treated and examined by the defendant's physician and remained under such physician's treatment or observation for a month or more.

At the time of the trial in June, 1918, there was testimony indicating that he was suffering from neurasthenia, that he had lost some weight, had an impaired memory, had lost his sexual desire, was troubled with restlessness, loss of attentive power, incapable of performing work, and was described by some of the physicians as being a mental and physical wreck.

The testimony of the defendant's witnesses was to the effect that plaintiff approached the steps of the smoking car to enter; that the brakeman then told him that he, the plaintiff, was intoxicated and could not be permitted to enter the

train; that the plaintiff violently remonstrated and then walked forward from the rear end of the smoking car, down the platform, to about the middle of the baggage car, and there spoke to the conductor about his being refused admission to the train; that the conductor in effect informed him that it was the duty of the brakeman to enforce such regulation and that he should not enter; that he returned to the place where the brakeman was standing and again insisted on entering; that Policeman O'Brien then took hold of him and informed him that as long as he had been refused admission to the train he should not attempt to get on. The plaintiff nevertheless pulled away from O'Brien, and as the train was moving out from the depot jumped upon the steps of the smoker, and the brakeman, then seeing that he was upon the car, helped him on or permitted him to enter. He then went into the smoker and sat down at the rear end of that coach; that the brakeman then came to him and told him that he must leave the train; that the conductor who boarded the train at the baggage car, seeing the commotion at the rear end, came down through the smoking car directly to where the plaintiff was standing, and, placing his hand upon him, also informed him that he must leave the train and gave the signal to the engineer to stop the train; that the plaintiff then, without use of force by either the conductor or brakeman, passed out of the smoking car and down the steps, the conductor retaining hold upon him until the train had stopped; at a point about a block below the depot and when it came to a full stop the conductor let go of the plaintiff, who then stepped off the train in the usual way, and upon signal being given the train proceeded.

It was also testified on behalf of the defendant that as the train pulled away from the point where plaintiff had stepped off, the rear brakeman was standing on the platform of the last car, and that plaintiff, just as the end of that car was passing him, swung his arm with the handbag towards and as if to strike the rear brakeman, and that as a result of such

swing the plaintiff fell over onto the track at the rear of the train and upon his handbag; that the policeman, O'Brien, had walked up along the platform in the direction the train was moving after having seen the plaintiff board the train and reached plaintiff at about this same street crossing.

The plaintiff was corroborated as to his being sober by two witnesses who saw him a few moments before the train time, one a bartender at the saloon which he last visited, and a man who was there with him. That he had entered the car while the train was standing still at Rhinelander, according to his theory and contrary to the testimony of the train employees, was in a measure corroborated by a witness called by the defendant, an Italian who was a passenger on the train and at the rear end of the smoker, who testified that he saw the plaintiff enter while the train was standing still at Rhinelander and stand up at the rear end of the smoker; that the plaintiff was then intoxicated, as could be seen by the witness; and that he was asked to leave the coach by the brakeman and conductor, and that no force was used or kick administered, although there might be some question, from his position in the car, as to whether he could have seen the kicking done, if it was done as testified to by plaintiff.

We fully appreciate the weight that should be given to the findings of a jury on questions of fact submitted to them (*Delvaux v. K., G. B. & W. R. Co.* 167 Wis. 586, 596, 167 N. W. 438) as a proper rule to be recognized by the trial court and by this court, and we merely repeat the rule now that it may be seen that it is not being overlooked. Yet the testimony in this case, taking also into consideration the manner in which the trial was conducted to which attention has been given, presents a situation where we feel it our duty to say that the verdict of the jury in this case was the result of passion or prejudice and against the overwhelming testimony, and cannot stand as a foundation for a judgment in favor of the plaintiff. *Parkes v. Lindenmann,* 161 Wis. 101, 109, 151 N. W. 787.

His own testimony amounts to this: That two employees of the railroad company, coming from different parts of the train, having had no prior communication between them on the subject, without the slightest ground for believing the passenger was intoxicated, without having made any prior objection to his entering the train (although the brakeman had been standing on the depot platform at the time of the passenger's entering, charged with the duty, under sub. 1, sec. 1565—1, Stats., of preventing persons intoxicated from entering such train), jointly attack such passenger, who was quietly seated and with his proper ticket; that such employees should jointly and with the use of precisely the same violent, profane, and abusive language forcibly remove such passenger when he expressed a perfect willingness to leave the train; and was proceeding so to do voluntarily, making no resistance and expressing no resentment of such treatment or language until after reaching the ground; the language he then used, under the conceded facts, being too obscene and vulgar to be set forth here even in abbreviated form.

There is no possible reasonable explanation of why the conductor should come down through the smoking car without first taking up tickets, which it is without dispute he did, and assist the brakeman in forcibly ejecting this passenger, unless he had been informed either by plaintiff or by a seeing of it that some controversy had already taken place between the plaintiff and the brakeman. If there had been such prior controversy so denied by plaintiff, then his testimony as to the alleged assault is so discredited that in the light of the other testimony and facts it ought to have no weight with an unprejudiced jury.

The plaintiff positively denied having gone forward to the baggage car and speaking to the conductor about being refused admission; that he did so go forward was testified to by the brakeman, conductor, Policeman O'Brien, and defendant's telegraph operator who was then acting as baggageman.

But plaintiff denied absolutely that there had been any controversy with the brakeman before entering the car or that Officer O'Brien had hold of him or had attempted to hold him as he was trying to get on the train. The contrary was testified to by Policeman O'Brien, the brakeman, the ticket agent who sold the plaintiff his ticket and who stepped out onto the platform, and by two other witnesses, Rouman and Kuroski, who were on the platform at the time and who were not employees of defendant.

The plaintiff's own version of this occurrence is so contrary to all reasonable probabilities, so contrary to common experience, and so overcome by the weight of evidence from unimpeached and disinterested witnesses that it was the duty of the trial court to have set aside this verdict and granted judgment for the defendant. The trial court having failed so to do, it now becomes the duty of this court to so direct.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for defendant.

SVOBODA, Respondent, vs. BARTA, Appellant.

April 29—May 27, 1919.

Sales: Provision for acceptance of article sold by retention for one day: Waiver: Question for jury.

1. A provision in a written warranty that a tractor sold by defendant to plaintiff might be tested for one day and that retention thereafter should constitute an acceptance, is *held* waived by the vendor in view of the conduct of the parties.
2. Under sec. 1684*t*—48, Stats., as to acceptance of goods by retention for longer than a reasonable time, retention of the tractor for nearly a year after delivery is not, as a matter of law, a retention amounting to acceptance, in view of evidence that opportunities for testing were limited and that the buyer was being urged by the seller to give the tractor a further trial upon the assurance that it would be made to work.

APPEAL from a judgment of the circuit court for Kewaunee county: W. B. QUINLAN, Judge. *Affirmed.*

Action to recover the purchase price of a tractor, upon rescission for breach of warranty. On the 25th day of September, 1916, plaintiff purchased of defendant, an implement dealer, a Moline Universal tractor. It was warranted to work equal to any other first-class machine made for doing the same work, if not better, under proper management. It was agreed that the purchaser should have the use of the machine for one day on trial, and in case anything proved defective due notice should be given to the seller or his agent and time allowed to send a person to put it in order, after which, if it did not work and the fault was in the machine, it would be taken back or the defective parts replaced or the money or notes given in payment refunded. It was also provided that further use would be considered an acceptance of the machine by the purchaser.

The tractor was delivered on plaintiff's farm on the 28th or 29th of September. Defendant went out the next morning to start it. A stone broke the gearing. It was fixed by noon, or a little after, and *Barta* tried it out in the afternoon. According to plaintiff's testimony he did not use the tractor on the succeeding day, but did attempt to plow with it on the following day and he could not operate it. *Barta* came up and found one of the nuts from one of the gears was gone. He took it to town and did not return it for more than a week. When returned, another trial was made. *Svoboda* attempted to plow with it the next day, but after plowing about two hours the engine stopped working. He again had *Barta* come out to look it over, and the shifting lever was found to be broken. It took a week to have this repaired. It was fixed in the forenoon and plowed all right in the afternoon. It worked about two or three hours the next day and then the engine stopped again. *Svoboda* told *Barta* he must fix it so it works or take it back. *Barta* said he would come and fix it and that it would have to work.

It was then concluded to install a new engine on the tractor, which took until about Christmas. It was then started, and they attempted to cut feed with it. While they were operating it a shaft that runs water around the cylinder broke, which had to be taken to town to be repaired. After cutting the feed *Barta* asked *Svoboda* if he was satisfied now, and he said "No;" the machine was guaranteed to plow and this is no trial. *Barta* reassured him that the machine was guaranteed to do all of his plowing on his whole field and told him to keep it until the tractor had plowed his whole farm. He said he guaranteed the machine to plow everything he had to plow. The tractor was not used again until spring, when he did some harrowing with it, but it did not work satisfactorily. The same shaft broke again. He used it for harrowing for three or four days in May, for three or four hours each day. It did not work well. It did not feed the gasoline right. It smoked too much and made a lot of noise and got hot. *Barta* was there a couple of days, looked it over, cleaned the carburetor and adjusted the governors. No attempt was made to use it thereafter, until the latter part of July, when another attempt was made to plow with it. He tried it about eight hours, a couple of days, the latter part of July and August. It did not seem to have power. It was not strong enough to pull the plow. It heated up badly. *Svoboda* went to *Barta* and said he must fix the machine or he would return it. *Barta* said, keep the machine; he will fix it; that it will work, and that it has got to work. *Barta* came to look it over, tried to start it, but failed. He said he would get a man to come from the company to fix it. The matter ran along for two or three weeks, no man came, and *Svoboda* returned the tractor and brought this action to recover the purchase price. The following special verdict was returned by the jury:

"(1) Did the tractor delivered to the plaintiff, *John Svoboda,* on or about the 29th of September, 1916, comply, on

or about said 29th day of September, 1916, with the written warranty given by the defendant, *Joseph M. Barta,* to the plaintiff, *John Svoboda?* *A.* No.

"(2) If you answer the first question 'No,' then answer this: Did the tractor at any time subsequent to on or about the 29th of September, 1916, comply with the written warranty given by the defendant, *Joseph M. Barta,* to the plaintiff, *John Svoboda?* *A.* No.

"(3) Did the plaintiff, *John Svoboda,* at any time between on or about September 28 or 29, 1916, and the first part of October, 1917, accept the tractor? *A.* No.

"(4) Did the plaintiff, *John Svoboda,* when operating said tractor, follow the instructions and properly oil, operate, and manage said tractor? *A.* Yes.

"(5) Did the defendant, *Joseph Barta,* induce the plaintiff, *John Svoboda,* to retain the tractor for further trial up to the time that the plaintiff, *John Svoboda,* offered to return the tractor? *A.* Yes.

"(6) Did the plaintiff, *John Svoboda,* retain the said tractor in his possession an unreasonable length of time for the purpose of the trial after he found the same to be unsatisfactory? *A.* No."

Upon the special verdict judgment was entered in favor of the plaintiff and against the defendant, from which judgment the defendant appealed.

Joshua L. Johns of Algoma, for the appellant.

For the respondent there was a brief by *Bruemmer & Bruemmer* of Kewaunee, and oral argument by *Otto H. Bruemmer.*

OWEN, J. Appellant contends that the verdict is not supported by the evidence. This contention was rejected by the trial court. An examination of the record convinces us that the verdict is supported by ample testimony. No more need be said upon the question.

It is further contended that the retention of the engine by respondent for nearly a year after its delivery amounted to

an acceptance thereof, and that the right of rescission had been waived. Sec. 1684*t*—48, Stats., provides that

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

This is but a legislative embodiment of a rule firmly established by the decisions of this court. *J. L. Owens Co. v. Whitcomb,* 165 Wis. 92, 160 N. W. 161, and cases there cited. In that case it was held that the use of a machine for a length of time unnecessary for any reasonable test to be made thereof must be considered an acceptance. While in this case the written warranty provided that the tractor might be used for one day for the purpose of testing it, and that retention thereafter should constitute an acceptance, it is clear from all the testimony in the case, as well as the conduct of the parties, that this provision was waived by the vendor, and, in fact, it is not contended that an acceptance resulted by reason of this provision in the warranty. The contention is rather based upon the broad general principle that the tractor was retained by respondent for an unreasonable length of time, in view of all the facts and circumstances of the case. Respondent's testimony, a *résumé* of which is set forth in the statement of facts, very strongly indicates that at no time did the tractor work to that degree of efficiency which he had a right to expect. The evidence on behalf of the respondent indicates, too, that the tractor never did a satisfactory day's work, especially when it was used for plowing, and that it was giving almost continual trouble is fairly deducible from the evidence of appellant himself. The only opportunity for plowing with the tractor was in the fall of 1916, and very soon after the delivery thereof appellant concluded to replace the engine. Obviously this conclusion was prompted by the fact that the engine did not work

satisfactorily. Respondent's testimony indicates that he did not get one good day's work out of the tractor during the fall of 1916. Of course there was no opportunity to test it out in plowing during the winter. It was used only for harrowing purposes during the spring, the first occasion for plowing being the first of July.

The evidence is sufficient to justify the conclusion that the tractor did not work well in harrowing and that it utterly failed to work satisfactorily in plowing. It will thus be seen that, while the respondent retained the engine in his possession for upwards of a year, opportunities for testing the tractor were limited; that no test proved satisfactory; and that during all that time he was urged to retain the tractor and to give it further trial, upon the assurance that it would be made to work. We cannot say as a matter of law that the retention, under the circumstances, amounted to an acceptance. On the other hand, the evidence justifies the finding of the jury that there was no acceptance.

It is unnecessary to discuss in detail further contentions made by appellant. They were all covered by the special verdict of the jury, which we find is supported by the evidence in the case. It follows that the judgment should be affirmed.

By the Court.—Judgment affirmed.

SHINE, Respondent, vs. HAGEMEISTER REALTY COMPANY, Appellant.

April 29—May 27, 1919.

Contracts: Action for balance of contract price: Conditions precedent: Issuance of architect's certificate: Mistake: Evidence: Sufficiency: Competency: Abatement and revival: Premature action: Waiver: Appeal: Harmless error: Adverse witnesses: Ground of reversal: Omissions from complaint.

1. Where a contract to install a heating plant in defendant's building required the issuance of the architect's certificate before payment was due, the complaint in an action for the balance due should have alleged either that such a certificate had been

issued or should have set forth facts showing that the certificate, though earned, had been fraudulently or mistakenly withheld.

2. Where the complaint omitted such necessary allegations, and there was no demurrer, and neither party was misled, and evidence was introduced on the question of the refusal of the certificate and the reason therefor, and there was a full and fair trial, the judgment, in view of sec. 3072*m*, Stats., would not be reversed solely for such omission.
3. Where the contract of installation provided that it was to be performed "as fast as the general construction will permit," the evidence is *held* to justify the jury's finding that the contract was performed as soon as the general construction and attending circumstances would reasonably permit.
4. In such case, statements by plaintiff and other contractors that steamfitters were scarce at the time and that men and supplies were hard to get, and that jobs of that kind were seldom completed on time, and that the work was done with customary speed, were incompetent, in view of the terms of the contract.
5. In an action to recover the balance due on a contract to install a heating plant, with a counterclaim for failure to install the same within the contract time so that frost broke up the basement cement floor, the admission of incompetent evidence on the question whether it was performed within the contract limit was not prejudicial, where the evidence showed that the damage to the floor did not result from plaintiff's delay.
6. Where the contract to install the heating plant authorized the architect to issue certificates for "work done and materials furnished upon the premises," manifestly not including the power to determine whether plaintiff's delay caused the cement floor to break up, his refusal of a certificate solely on that ground was a mistaken refusal within the meaning of the law and excused plaintiff from producing the certificate as a condition to recovery of the balance due.
7. The contention that the action should be dismissed because brought before the end of the thirty-day period during which final payment was to be made under the terms of the contract cannot prevail, that objection having been effectually waived by not setting up the fact in the answer and by totally denying liability and going to trial on the merits.
8. The fact that plaintiff called certain witnesses as adverse witnesses under sec. 4068, Stats., was not prejudicial to defendant, even if they were not within the classes named in that section, where all the testimony favorable to defendant on the vital issues in the case was fully and fairly placed before the jury.

APPEAL from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Affirmed.*

Action to recover a balance of $702 alleged to be due the plaintiff on a contract to install a heating plant in defendant's new business building in Green Bay. The defenses pleaded were (1) that the work had not been fully completed and (2) that no architect's certificate had been given to the plaintiff as required by the contract before payment was due. Two counterclaims were also interposed claiming (1) that, by reason of failure to install the heating plant within the contract time limit, frost entered the building and heaved up the basement floor, to the defendant's damage in the sum of $1,500, and (2) that by reason of the delay in installing the plant the defendant lost the use of the building for two months, to its damage in the sum of $950.

The facts were that in the summer of 1916 the defendant company was constructing a business block in Green Bay according to plans and specifications of Foeller & Schober, architects, and entered into a written contract with the plaintiff for the heating equipment August 7, 1916, which contract contained provisions (1) that the work was "to proceed as fast as the general construction will permit" and to be completed by December 15, 1916; (2) that the sum to be paid the plaintiff therefor was $1,685, "only upon certificates of the architects as follows: 85 per cent. of the work done and material furnished upon premises at any time architects issue a certificate; the final payment to be made within thirty days after the completion of the work included within this contract, and all payments shall be due when certificates for the same are issued."

It is admitted that the plaintiff's work was not fully completed by December 15th nor until about March 9th. The plaintiff claimed, however, and offered evidence tending to show, that he put in the heating plant just as rapidly as the work of general construction of the building permitted and that steam was actually turned on December 28th. On the other hand, the defendant's evidence tended to show that the

plaintiff was not materially impeded in his work by any delays on the part of the general contractors, and that by reason of the failure to get the heating plant installed and at work by December 15th the newly-laid cement floor of the basement was heaved up and ruined by extreme cold weather which came late in December. The damage to the floor was conceded on all sides, but the plaintiff contended that it resulted from other causes. The architect gave the plaintiff a certificate for $1,000 which was paid by the defendant, leaving a balance of $685 on the contract price and $17 for temporary heating, which is not seriously in dispute if it be a fact that the plaintiff is not responsible for the heaving of the basement floor. The defendant claimed that in some minor matters the contract never had been fully completed, but the architect testified that the breaking of the floor was the only reason for the withholding of the certificate.

The jury found by special verdict (1) that the contract was made as alleged in the complaint; (2) that it was performed as reasonably promptly as the general construction of the building and other attending circumstances reasonably permitted; (3) that the damage by the injury to the floor was $900; (4) that the floor was injured by frost; and (5) that the amount of the unpaid balance on the plaintiff's contract and for extras was $702. Motions to change the answers to questions 2 and 4 were overruled by the trial court and judgment entered for the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *Silverwood & Fontaine* of Green Bay, and oral argument by *T. P. Silverwood.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald F. Clifford,* all of Green Bay.

WINSLOW, C. J. As the contract in question required the issuance of the architect's certificate before any payment was due, the complaint should have alleged either that such

a certificate had been issued or should have set forth facts showing that the certificate, though earned, had been fraudulently or mistakenly withheld. *Hudson v. McCartney,* 33 Wis. 331; *Mindeman v. Douville,* 112 Wis. 413, 88 N. W. 299. There was no demurrer, either written or oral, but at the opening of the trial defendant moved to dismiss the complaint and for judgment on the pleadings. This motion probably raised the question as to sufficiency of the complaint, though it does not appear that attention was called to the defect. However, neither party was misled, and evidence was introduced *pro* and *con* on the question of the refusal and the reason for it, and we have now passed the time when, after a full and fair trial, a reversal of judgment will be ordered for the sole reason that the complaint as originally served was defective. Sec. 3072*m,* Stats.

There was sufficient evidence introduced, as it seems to us, to justify the findings of the jury to the effect (1) that the contract was performed as soon as the general construction and other attending circumstances would reasonably permit and (2) that the injury to the basement floor was not occasioned by frost. As to the first of these propositions the argument is made by defendants, not merely that it does not meet the contract provision that the work is to proceed as "fast as the general construction will permit," without regard to other circumstances, but that much evidence was allowed to be introduced bearing on the question submitted which was entirely incompetent so far as the requirement of the contract was concerned.

The evidence objected to consisted of statements by the plaintiff and other contractors to the effect that steamfitters were scarce at the time, that men and supplies were hard to get, that jobs of this kind were seldom completed on time, and that the work was done as rapidly as such work is customarily done.

It seems quite clear that this evidence was all incompetent, because the plaintiff's contract was absolute to push the work

as fast as "the general construction would permit," not as fast as "the general construction and other attending circumstances" would permit. If the result of the action depended on this finding it might be quite doubtful whether the judgment could be sustained, but we do not think it does. It was the injury to the basement floor which forms the basis of the only counterclaim now insisted on by the defendant. If this was not caused by frost, no damage is shown to have resulted from plaintiff's delay. As we have concluded that there was sufficient evidence to sustain the jury's answer to this question and that there was no prejudicial error in the rulings so far as this question is concerned, the question whether the erroneous rulings complained of were prejudicial or not becomes immaterial and the counterclaim drops out of the case.

The objection that no architect's certificate was ever obtained still remains in the case, however, and must be disposed of before the judgment can be affirmed.

As indicated in the opening of this opinion, it was necessary for the plaintiff to have the certificate or to show clearly by evidence that it had been withheld by the architect fraudulently or arbitrarily or by reason of a substantial mistake as to his powers or duties. *Coorsen v. Ziehl,* 103 Wis. 381, 79 N. W. 562.

In the present case the architect clearly attempted to pass upon a matter not submitted to him by the contract, namely, the responsibility for injury to the cement floor. His powers were simply to issue certificates for "work done and materials furnished upon the premises" by the plaintiff. Manifestly that does not include power to determine that the plaintiff's delay caused the cement floor, which had been laid by another contractor, to heave up. A refusal to award a certificate because of matters entirely outside of the submission is necessarily a mistaken and arbitrary refusal and amounts in law to a fraudulent refusal, even though made in entire good faith. The architect, on the witness stand,

stated that the breaking of the floor was the only reason why the last certificate was withheld. This was in legal contemplation no reason. The plaintiff's work having been done and materials having been furnished, the certificate was due, and the question whether plaintiff's delay in installing the apparatus caused the breaking of the floor which another contractor had put in was a question to be fought out between the parties after the certificate was given. The architect mistook the scope of his duty and because of that misapprehension refused the certificate. This makes the refusal a mistaken refusal within the meaning of the law, and excuses the plaintiff from producing the certificate.

The contention that the action must be dismissed because brought before the end of the thirty-day period during which final payment was to be made under the terms of the contract, cannot prevail because the objection has been effectually waived by not setting up the fact in the answer and by totally denying liability and going to trial on the merits. *Lohr B. Co. v. Ferguson,* 223 Ill. 88, 79 N. E. 35.

Certain witnesses were called by the plaintiff on the trial as adverse witnesses under the provisions of sec. 4068, Stats., and it is claimed by the appellant that they were not within the classes of persons who could be called as adverse witnesses under the provisions of the section cited. We have been unable to see that the defendant was in any way prejudiced by the fact that the witnesses were called as adverse witnesses. All the testimony favorable to the appellant on the vital issues in the case seems to have been placed before the jury fairly and fully; under such circumstances there can be no reversal even if the witnesses were not within the classes named in sec. 4068.

By the Court.—Judgment affirmed.

LUKENS IRON & STEEL COMPANY, Appellant, vs. HARTMANN-GREILING COMPANY, Respondent.

April 29—May 27, 1919.

Sales: Contract to deliver: Delivery within reasonable time: When time is essence of contract: Failure to deliver: Waiver of damages: Duty of injured person to minimize damages: Broker or agent: Imputed knowledge.

1. Whether the person making a sale is called a broker or an agent is not material, the knowledge of either being the knowledge of the principal.
2. One who breaches a contract to deliver materials is chargeable with such damages as might fairly and reasonably be considered as either arising naturally—that is, according to the usual course of things—from such breach, or such as may reasonably be supposed to have been in contemplation by both parties, at the time they made the contract, as the result of a breach thereof.
3. Where the time of delivery is not fixed in a sale of goods, delivery must be made within a reasonable time.
4. Where steel was ordered to be used in completing a marine boiler to be installed in a dredge then being constructed by the purchaser for the government, the purchaser being liable to certain penalties if the boiler was not completed on a certain date, an agreement by the seller to deliver the steel within three weeks was of the essence of the contract, the seller having knowledge of the penalties.
5. Where the seller had failed to deliver the steel within the time agreed, an agreement to waive damages if it should be shipped December 1st was not binding on the purchaser where it was not shipped until December 9th.
6. The mere acceptance by the purchaser of property after damages have accrued in consequence of nondelivery according to contract does not waive or relinquish a right of action for damages which had accrued at the time of acceptance.
7. Where one claiming damages for breach of a contract can minimize the damages he is obliged to do so and not unnecessarily increase them.

APPEAL from a judgment of the municipal court of Brown county: CARLTON MERRILL, County Judge and Acting Municipal Judge. *Affirmed.*

This action was brought to recover for a quantity of steel used in the completing of a marine boiler to be installed in a dredge called the "Gaillard," then being constructed by the defendant at Green Bay for the United States government at an agreed price of $105,000. The boiler was to be completed by April 4, 1916. The market value of the material furnished was $1,113.55.

The issues in the case are raised upon counterclaims of defendant for alleged damage occasioned by delay in delivery of the material and for the cost of reflanging the hole in the boiler head claimed to have been defective. The original inquiry respecting the purchase of this material was made through A. M. Castle & Company, with offices in Chicago and Milwaukee, who advertised as Western Sales Agents of the plaintiff.

The case was tried to the court and a jury, and the jury found by special verdict that the plaintiff failed to deliver the steel within the time required by the contract; that the delay in delivering the material was not occasioned by the act or default of the defendant; that the neglect of the plaintiff to deliver the material within the time required by the contract was the proximate cause of the delay in completing the dredge by defendant until after the 4th day of April, 1916; that the defendant did not waive the delivery by plaintiff of the material within the time required by the contract; that the defendant was damaged by reason of plaintiff's failure to deliver the steel and material within the time required by the contract in the sum of $1,000; that plaintiff failed to properly flange the furnace heads according to the contract between plaintiff and defendant, and defendant was damaged thereby in the sum of $182.

The court ordered judgment on the counterclaim for $86.45, being the difference between the market value of the material furnished, $1,113.55, and the aggregate amount of damages, $1,182. Plaintiff appealed from the judgment.

For the appellant there was a brief by *Kittell, Jaseph & Redfield* of Green Bay, and oral argument by *Lynn D. Jaseph.*

C. W. Lomas of Green Bay, for the respondent.

KERWIN, J. It is established by the evidence and the verdict that the defendant in May, 1915, entered into a contract with the United States government to build a dredge, and afterwards negotiated with A. M. Castle & Company for the purchase of material for the steam boiler in said dredge. The negotiations with A. M. Castle & Company resulted in an order addressed to the plaintiff for such material at an agreed price to be charged to the defendant. No time was fixed for delivery. A. M. Castle & Company knew that the contract contained penalties in case of failure to complete within the time specified in the contract of defendant with the United States government. Although defendant, after the order of August 17th was placed, repeatedly insisted upon quick delivery, no shipment was made until December 9, 1915. The defendant accepted the material but did not pay for it. Because of the delay in shipping defendant was obliged to construct the boiler at extra expense and was unable to complete the dredge according to the terms of its contract with the government, and sustained damages on account of interest on money withheld by the government, expense of insurance and inspection during the period of delay. Several contentions are made by appellant for reversal, which we shall treat in their order.

1. It is contended that A. M. Castle & Company were not the agents of the plaintiff in making the sale to defendant. A. M. Castle & Company advertised on their letter-heads and correspondence that they were the "Western Sales Agents *Lukens Iron & Steel Company,*" and the correspondence generally, which was quite extensive, tends to show that A. M. Castle & Company was the agent for plaintiff in selling the material in question. They placed the order with plaint-

iff and corresponded with it with reference thereto. It is true that the negotiations which resulted in placing the order for the steel were carried on between defendant and A. M. Castle & Company, but the evidence tends to show that they were acting for plaintiff. Moreover, the plaintiff adopted the contract made through A. M. Castle & Company as its contract, made it its own, and sued upon it. The letter relating to waiver and insisting that plaintiff would not ship unless penalty was waived also tends to show that A. M. Castle & Company were agents of plaintiff in the deal.

The appellant insists that A. M. Castle & Company were brokers, not agents of plaintiff. It is not very material whether they be styled brokers or agents. The question is, Did they act for plaintiff in making the contract in question, and did plaintiff adopt the contract, act upon it, and deliver the steel under it? The knowledge of a broker is generally imputed to the principal. 9 Corp. Jur. 673. The evidence also tends to show that plaintiff affirmed the contract made for it by A. M. Castle & Company. We are satisfied the evidence shows that A. M. Castle & Company were agents of plaintiff, and that plaintiff was bound by their acts and knowledge. A. M. Castle & Company knew the terms of the government contract at least as early as the date of completion of the contract, August 17, 1915, and knew that it was a penalty contract. Their knowledge was the knowledge of the plaintiff, hence plaintiff was chargeable with such damages as might fairly and reasonably be considered as either arising naturally—that is, according to the usual course of things—from such breach, or such as may reasonably be supposed to have been in contemplation by both parties at the time they made the contract as the result of a breach thereof. *Hadley v. Baxendale,* 9 Exch. 341; *Kellogg v. Malick,* 125 Wis. 239, 103 N. W. 1116; *Gross v. Heckert,* 120 Wis. 314, 97 N. W. 952; *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119.

The question of agency on the evidence produced was for

the jury. *Garlick v. Morley,* 147 Wis. 397, 132 N. W. 601; *Taylor v. Seil,* 120 Wis. 32, 34, 97 N. W. 498.

It is argued that plaintiff did not know that the defendant's contract with the government imposed penalties. But A. M. Castle & Company, agents of plaintiff, knew it, and its knowledge was attributable to plaintiff. *Ross v. Northrup, King & Co.* 156 Wis. 327, 144 N. W. 1124; *Owen v. Roberts,* 36 Wis. 258; *Geel v. Goulden,* 168 Mich. 413, 134 N. W. 484; *Ney v. Eastern I. T. Co.* 162 Iowa, 525, 144 N. W. 383; *Brown v. People's Nat. Bank,* 170 Mich. 416, 136 N. W. 506.

2. It is further insisted that the steel was furnished within a reasonable time. It is true no time of delivery was fixed in the order, but the rule of law is well settled that under such circumstances the delivery must be within a reasonable time. *Lang v. Menasha P. Co.* 119 Wis. 1, 96 N. W. 393. The jury found that plaintiff failed to deliver the steel within the time required by the contract. The question as to what constitutes a reasonable time on the evidence in this case was for the jury. *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 120 N. W. 277; *Greenwood v. Davis,* 106 Mich. 230, 64 N. W. 26.

When the order was solicited by A. M. Castle & Company in June, 1915, they stated that the order could be filled in about three weeks. There was a large amount of correspondence between A. M. Castle & Company and plaintiff respecting the details of the material to be furnished and the order was finally placed August 17, 1915. After this the evidence shows that defendant was constantly urging immediate delivery and threatened the enforcement of the penalties and damages in case the order was not promptly filled. In A. M. Castle & Company's letter dated August 17, 1915, to the plaintiff it is stated, respecting the order for the material, "This is a lot we protected them on at above price," and it is also stated in this letter that all materials are to be made according to United States government rules and regula-

tions. The order practically described the material to be furnished and the price. While the defendant had a right under the terms of the contract to believe that this material would be furnished within a reasonable time after August 17, 1915, and, as the correspondence shows, was represented could be furnished within three weeks, it was not shipped until the 9th day of December following and was not received by defendant until December 22d. In the instant case time was of the essence of the contract. *Henderson v. McFadden,* 112 Fed. 389.

3. It is contended by appellant that defendant waived delivery according to the contract, hence was not entitled to damages. This contention is based upon the proposition that since A. M. Castle & Company, acting for plaintiff, offered to ship December 1st provided defendant would waive damages, and that defendant consented to receive the steel on this proposition and afterwards received the material which was shipped December 9th, it thereby waived all damages. The difficulty with this contention is that, even assuming for the purpose of the argument that defendant did consent to waive damages if shipment was made in accordance with the proposition, the plaintiff failed to comply with the proposition so made, because shipment was not made until December 9th. This court has held that waiver is the voluntary relinquishment of a known right, and has also held that the mere acceptance of property under a contract to deliver, after damages have accrued in consequence of nondelivery according to the contract, does not waive or relinquish the right of action for damages which had accrued at the time of the acceptance of the property. *Schweickhart v. Stuewe,* 71 Wis. 1, 36 N. W. 605.

The rule of the foregoing case is particularly applicable in the instant case. Here the damages had accrued at and prior to the time of the shipment, and to refuse delivery at that time, under the circumstances of this case, would greatly enhance the damages, because the defendant would be unable

to obtain the material, hence the construction of the dredge would be greatly delayed and the damages thereby greatly enhanced. Where one claiming damages for breach of contract can minimize the damages he is obliged to do so and not unnecessarily increase them; and so the fact that defendant accepted the delivery and thereby minimized damages was not a waiver of damages accrued at the time, unless it appears that the defendant voluntarily waived the damages which had accrued. *Sixta v. Ontonagon Valley L. Co.* 157 Wis. 293, 306, 147 N. W. 1042.

The evidence in the case supports the finding of the jury that the defendant did not waive. In order to constitute a waiver in this case it was necessary for the plaintiff to show that it had strictly complied with its proposition upon which the waiver was based. It did not do so. It made a proposition to ship December 1st if defendant would waive damages. Defendant replied to this proposition by telegram merely stating, "Ship boiler material first next week follow by tracer O. K." The proposition and telegram, therefore, did not amount to a waiver, because the proposition upon which the alleged claim of waiver is based was not complied with. Whether, if the plaintiff had complied with its proposition and had shipped December 1st, the acceptance of the goods under the telegram sent by defendant would have amounted to a waiver of damages which had accrued at that time under the peculiar circumstances of this case, we need not and do not decide. The situation was peculiar. At the time the order was given the steel could have been easily obtained. At the time of the alleged waiver and for a long time prior thereto the steel market had tightened and the defendant could not have obtained the steel elsewhere. Therefore the defendant was forced to accept it when it did or greatly enhance damages.

4. Point is made by counsel for appellant that error was committed in the admission and rejection of evidence. We find no prejudicial error under this head. We are convinced

that the verdict is supported by the evidence and warrants the judgment rendered.

By the Court.—The judgment of the court below is affirmed.

BELL LUMBER COMPANY, Respondent, vs. BAYFIELD TRANSFER RAILWAY COMPANY, Appellant.

April 30—May 27, 1919.

Carriers: Carriage of goods: Liability for loss due to delay: Loss by fire: Negligence: Proximate cause.

1. A carrier not shown to be insolvent is liable to a shipper for damages resulting from a drop in prices of forest products tendered and awaiting shipment because of delay in transportation owing to the fact that its road was being repaired, where the repairs were unnecessarily delayed owing to a lack of money, which the carrier could have procured if it had used due diligence.
2. Where the carrier knew that forest products banked on a spur track awaiting shipment were exposed to the danger of forest fires, the occurrence of which was and should have been anticipated, and that such danger was in direct proportion to the length of the delay in their transportation, and such products were destroyed by a forest fire more than a month after their tender for shipment, the unreasonable delay in repairing the road was the proximate cause of the loss.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action to recover damages claimed to have been sustained by plaintiff by reason of the failure of the defendant, as a common carrier, to seasonably furnish cars to transport plaintiff's forest products to market. It appears from the evidence that a portion of the forest products was banked on a spur track, called Wachsmuth spur, owned by a private corporation and used in connection with its private business, from which spur it was the custom to take out products so banked on cars furnished by defendant; and a portion was banked on defendant's own line of railway at a place called

Russell's Crossing. Owing to the disrepair of defendant's line of road, and especially of its bridges, traffic was wholly suspended thereon from April 3 to May 12, 1914, while repairs were being made. On May 18, 1914, the forest products located on the spur were burned by a forest fire in no way caused by the defendant. On the same date defendant's bridge No. 8 also burned.

Two separate recoveries are asked in the complaint; one for the value of the products burned at the spur and one for the loss sustained by reason of the decline in the market price of the products located on defendant's line while they were awaiting shipment. There is no dispute as to the amount of each element of damage if plaintiff is entitled to recover.

Defendant claims it was insolvent and that it made repairs with due diligence; and that the proximate cause of the destruction of the property by fire was not due to any act or negligence on its part. A jury was waived and the court found as facts: (1) That the defendant railway company as a common carrier negligently failed to keep its road in sufficient repairs to be in a condition to operate so as to haul plaintiff's forest products from the Wachsmuth spur before they were destroyed by fire on May 18, 1914, and before the bridge called bridge No. 8 was destroyed on the same date; (2) that such negligence was the proximate cause of the burning of plaintiff's material on the Wachsmuth spur and the damage to plaintiff by reason of its inability to fill orders from Russell's Crossing before bridge No. 8 burned on the 18th day of May, 1914; (3) that plaintiff made a sufficient tender of shipment of the material to the railroad company both at the Wachsmuth spur and Russell's Crossing.

As a conclusion of law the court found that plaintiff is entitled to judgment against the defendant for the sum of $1,812.40 damages on its first cause of action, with interest thereon from May 18th, and for $2,948 on its second cause of action, without interest. From a judgment entered accordingly the defendant appealed.

For the appellant there was a brief by *William F. Shea* of Ashland, attorney, and *Alfred H. Bright* of Minneapolis, Minnesota, of counsel, and oral argument by *Mr. Bright.*

For the respondent there was a brief by *Lamoreux & Cate* of Ashland, attorneys, and *Crownhart & Wylie* of Madison, of counsel, and oral argument by *C. A. Lamoreux* and *F. M. Wylie.*

VINJE, J. The findings of fact denominated as such made by the trial judge are set out in the previous statement. Introductory to such findings the judge says: "Having heretofore filed a statement in detail of my findings on the evidence, which will supplement these findings, I make these conclusions of facts." The only statement to which this can refer is the decision of the court found in the record in which facts are stated and discussed. Among such facts therein found are these:

"The defendant's superintendent knew in 1913 that the road was bad and bridges were deteriorating and was badly in need of repairs, that the defendant lacked funds for making repairs, but that no effort was made prior to the 1st of April, 1914, by the defendant to raise money with which to make repairs. It is not shown that the defendant lacked credit or was unable to obtain money for the purpose of making necessary repairs."

The evidence sustains these findings as well as those contained in the findings of fact denominated as such. That being so, the argument of the defendant that it was insolvent and hence it was not bound to perform an impossibility, namely, make repairs without funds, does not apply to the situation before us. Counsel has cited a large number of cases to sustain the proposition that a common carrier cannot be mulcted in damages for failing to perform the impossible. We need not inquire into the correctness of that proposition here because it does not fit the facts of the case. It quite conclusively appears from the evidence that Mr. Wales,

a director of defendant, stood ready to furnish funds for repairs upon being furnished reasonably accurate data as to their cost. The defendant did secure the funds from Mr. Wales and did voluntarily make the repairs, but, as the court found, it failed to make them seasonably. It is therefore liable to plaintiff for the damages resulting from a drop in prices of the forest products because of the unreasonable delay in transporting them. As we understand it, counsel for defendant does not controvert the conclusion of liability as to this cause of action if it was the duty of defendant to seasonably make repairs.

As to the cause of action founded upon the damages sustained by plaintiff by reason of the loss by fire of its forest products, it is earnestly argued that defendant cannot be held liable therefor because the delay in making the repairs was not the proximate cause of the loss. Many cases are cited by counsel to sustain this proposition. Upon examination, however, in so far as they are reasonably parallel they will be found to be cases where the loss sustained was as likely to occur where the goods would have been if seasonably transported as where they were waiting shipment, or where the loss was the result of a contingency that could not reasonably be anticipated, or an act of God, so called, relieving the defendant from liability, or where the loss occurring in transit was as likely to happen at one time as another. The case of *Northwestern C. M. Co. v. C., B. & Q. R. Co.* 135 Minn. 363, 160 N. W. 1028, strongly relied upon by defendant, is a good example of the two latter classes. There flour was to be transported from Minneapolis, Minnesota, to Bellington, West Virginia. It reached Columbus, Ohio, on March 19, 1913, and remained there in the railroad yards till March 25, 1913, when it was destroyed by an unprecedented flood. The court found unreasonable delay at Columbus, but held, adopting the federal rule, that the act of God and not the delay was the proximate cause of the loss. No doubt the correct rule was applied. The flood was as likely to hap-

pen to a seasonable shipment as to a delayed one and the cause was unprecedented and one not to be reasonably anticipated.

The facts in the present case are quite different. Here the freight was lying in a place known to be subject to a greater fire risk than in transit or at destination. Logs lying in the Northern woods are in a hazardous place because of the prevalence of forest fires, and this hazard is greater in spring and fall than during any other season owing to the absence of snow and green vegetation. The hazard is so great that, as the evidence shows, no insurance can be obtained on forest products so situated. This fact was known to both parties. Plaintiff early in April called defendant's attention to the danger from forest fires which the delay would occasion and urged speed in making repairs. It was therefore a danger that was anticipated. Proximate cause as defined in our law consists of two elements: first, a reasonably close physical causal connection between the negligence and the injury claimed as a result thereof so that it can be seen that but for the negligence the injury would probably not have resulted, and second, that the negligence must be of such a character, or occur under such circumstances, that an ordinarily careful and prudent man may reasonably foresee that an injury to another may probably follow from it. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735; *Wolosek v. C. & M. E. R. Co.* 158 Wis. 475, 149 N. W. 201. The latter is often called the element of anticipation, and, strictly speaking, characterizes negligence rather than causation, but is now too firmly entrenched in the definition of proximate cause to be removed therefrom. As applied to the facts in this case the law of proximate cause may be thus stated: When it is reasonably probable that an injury from an anticipated source may result to another from a failure to perform a duty owing to him, then the failure to perform such duty is the proximate cause of an injury sustained through such probable anticipated source. Here it was

known that the freight was exposed to the danger of forest fires and that such danger was in direct proportion to the length of the delay. It was of course not certain that forest fires would occur there, but that is not essential. It is enough that it be anticipated that they *may* occur. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735; *Feldschneider v. C., M. & St. P. R. Co.* 122 Wis. 423, 99 N. W. 1034. That was and should have been anticipated in this case. The court found but for the unreasonable delay of the defendant the freight would have been removed from its hazardous location and would have reached its destined market; so we have the requisite physical causation, namely, that had it not been for the unreasonable delay the loss would not have occurred. The conclusion reached is that the court properly allowed damages upon this cause of action also.

It should be noted that a compliance with the statute upon the subject of findings of fact requires all facts to be found separately and the conclusions of law separately. Sec. 2863, Stats. 1917. Facts will of course have to be stated and discussed in an opinion or decision such as was included in the record here, but all such facts should be found and stated under the heading "Findings of fact," so that the parties and the appellate court may know just exactly what the facts found are and where to look for them.

By the Court.—Judgment affirmed.

ANDRUS, Appellant, vs. CITY OF ASHLAND, Respondent.

April 30—May 27, 1919.

Municipal corporations: Grading streets: Liability for flooding premises by surface water: Extraordinary rainfall.

1. A city is not liable to a property owner for flooding his premises on the ground that by reason of the grading of the streets more water was discharged into a ravine in the block in which his premises were situated than would have come to it in a state of nature.

2. With reference to the liability of a city for the flooding of premises by surface water, rainfalls are divided into three classes: ordinary, extraordinary, and unprecedented; and a city is not liable for damage resulting from extraordinary rainfall.

APPEAL from a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Plaintiff brings this action to recover damages for flooding his premises. The plaintiff is the owner of a part of a block in the defendant city, bounded on the northerly side by Second street, on the easterly side by Vaughn avenue, on the southerly side by Third street, and on the westerly side by Sixth avenue. North and south across this block, in its original state, there extended a ravine several feet in depth. Through this ravine, from lands to the south about 160 acres in extent, surface water was discharged into Lake Superior. Across this block and upon the premises now owned by the plaintiff the city many years ago constructed a box sewer in the ravine, over a right of way procured by it. The sewer was approximately four by six feet, constructed of timbers, covered on the top, and extended to the north line of Third street. About 1904 or some time prior thereto Third street was filled in, and under Third street, in order to provide for the passage of water entering from the south, there were laid two pipes thirty-six inches in diameter connecting with the box sewer. It does not appear clearly from the testimony, but apparently south of Third street the trench was open, being carried under Fourth street and Vaughn avenue by box culverts which were replaced from time to time. Under Second street, after it was filled, there was constructed a brick arch and the box sewer discharged its contents into and through this arch into an open trench, by means of which the water flowed northerly into the bay. The box sewer was never a part of the sanitary drainage system of the city of *Ashland,* but was an arrangement for taking care of the surface water which in a state of nature was discharged through the ravine. However, there was connected to the

sanitary sewer a so-called overflow pipe from a manhole at the intersection of Vaughn avenue and Third street. This overflow pipe was some three feet above the regular sewer pipe and was supposed to be useful only in case the sanitary sewer was clogged or overtaxed. There was cut into the top of the box sewer on the premises of *Dr. Andrus* a hole, through which water falling on the block described might be let into the sewer. From the house and barn of *Dr. Andrus* there was also a connection with the sewer which was used for sanitary purposes. It appears that prior to June 22, 1916, there had been two occasions on which the basement of plaintiff's house was flooded, of which he complained to the public authorities. In 1909 the premises owned by Mr. Berg were destroyed by fire. In the fall of that year he commenced to rebuild. In his rebuilding operations he discovered that the box sewer which ran through his premises was out of repair, and after consultation with the street commissioner an informal arrangement was made by which Berg laid a twenty-four inch sewer pipe through his premises, the work being done by Berg and the material and pipe being paid for by the city. This was connected with the box sewer at the south line of Berg's premises, it being so constructed that the end of the box sewer was closed excepting for the opening made by the entry of the pipe therein. Plaintiff testifies that prior to 1909 he had never had any inconvenience or annoyance from the sewer. After 1909 on two occasions his cellar was flooded by water from the sewer. On the evening of June 22d there was a very heavy rainfall, as a result of which plaintiff's premises were flooded with considerable resulting damage. At the close of the trial the court directed a verdict in favor of the defendant, upon which defendant had judgment. Plaintiff appeals. Other facts are stated in the opinion.

For the appellant there were briefs by *Sanborn, Lamoreux & Pray* of Ashland, and oral argument by *Frank B.*

Lamoreux of Ashland and by *H. B. Walmsley* of Milwaukee.

C. A. Lamoreux of Ashland, for the respondent.

ROSENBERRY, J. Plaintiff claims to have been damaged in two ways:

(1) That by reason of the grading of the streets more water was discharged into the ravine than would have come to it in a state of nature, and because the waters so collected were discharged upon him in unusual quantities with added force.

Upon that branch of the case we think the decision of the trial court is clearly right. We shall not attempt to restate the facts, as it would serve no useful purpose in this or in any other case.

(2) Plaintiff further claims that the defendant is liable by reason of the insufficiency of the outlet of the box sewer at the point where it is connected with the twenty-four inch pipe through the premises of Berg. The box sewer was no part of the sanitary sewer system of the defendant city. Therefore no question of the adequacy of the plan is before us. We do not find it necessary in this case to determine whether or not the city is liable for the insufficiency of the outlet to the box sewer. The court in directing the verdict said:

"Most of the damage, certainly, if not all, was caused by the surface water flowing naturally in the direction of plaintiff's premises, where it always had, the only difference, apparently, being that this was an unusual, if not extraordinary, rainstorm, or freshet, and for which no legal liability attached to the city."

The evidence as to the character of the storm is practically uncontradicted and in our opinion conclusively establishes the fact that the storm in question was at least extraordinary. Rainfalls are divided into three classes: ordinary,

extraordinary, and unprecedented. The city is not liable for damages resulting from an extraordinary rainfall. *Geuder, Paeschke & Frey Co. v. Milwaukee,* 147 Wis. 491, 133 N. W. 835. The conclusion of the trial court that the damage in this case was the result of such a rainfall is amply sustained by the evidence and the case presents no jury question. The question as to whether the outlet of the sewer is sufficient to discharge surface water accumulating from an ordinary rainfall is not presented by this record. Upon the case presented the trial court was clearly right.

By the Court.—Judgment affirmed.

MCGINTY, Appellant, vs. BROTHERHOOD OF RAILWAY TRAINMEN, Respondent.

April 30—May 27, 1919.

Life insurance: Question for jury: Misrepresentations: Witnesses: Confidential communications: Physician and patient: Waiver.

1. In an action on a life insurance policy, the question whether insured's father was afflicted with cancer, contrary to the statement of insured in his application, and in fact died of cancer, is for the jury.
2. In such an action the court properly refused to permit a physician to testify that he told insured's mother that her husband had cancer, the mother having testified that the physician made no such statement; for the physician's knowledge in this respect constituted a communication the confidential nature of which could be waived by no one except insured's father himself, and the physician could not thus be permitted to testify indirectly as to matters concerning which he could not testify directly.

APPEAL from a judgment of the circuit court for Juneau county: JAMES WICKHAM, Judge. *Reversed.*

This action was brought by the plaintiff, mother of John McGinty and beneficiary under a policy of life insurance issued upon his life by the defendant. John McGinty died February 25, 1913. His application for life insurance was

made in September, 1911. In such application he stated that he himself had never been afflicted with syphilis or any disease of the genital or urinary organs, and that his father had never had any cancerous disease. The *Brotherhood* defended on the ground that these representations were false, and that John McGinty, the insured, had been afflicted with syphilis prior to his application for the insurance, and that his father, prior to such application, died as a result of a cancer. The issues thus raised were the only questions litigated.

The jury returned the following special verdict: (1) that Michael McGinty, the father of the insured, was not afflicted with cancer; (2) that the applicant, John J. McGinty, at the time the application was made, September 26, 1911, had never been afflicted with syphilis; (3) that the applicant, John J. McGinty, at the time the application was made, had never been afflicted with gonorrhea; (4) that the certificate in question was not procured by the fraud and deceit of John J. McGinty; and (5) damages, $1,880.50.

The defendant thereupon moved to change the answers of the jury to the first four questions of the special verdict from No to Yes, and, in the event of a denial of such motion, for judgment notwithstanding the verdict, on the ground that it was not supported by the evidence. The court changed the answer of the jury to the first question from No to Yes, denied the motions as to the other questions, and, upon the verdict as so changed, ordered judgment for the defendant, from which plaintiff appealed.

For the appellant there were briefs by *J. T. Dithmar* and *R. P. Clark,* both of Elroy, and oral argument by *Mr. Dithmar.*

For the respondent there was a brief by *Bentley, Kelley & Hill* of Baraboo, and oral argument by *F. R. Bentley.*

OWEN, J. The principal question to be considered is whether there is any credible evidence to support the answer

of the jury to the first question of the special verdict whereby it was found that Michael McGinty, father of John McGinty, did not die of a cancer. The evidence in this respect shows that during the month of January, 1910, Michael McGinty was struck on the jaw by a piece of wood, and that from that time on he suffered more or less pain in the head, and especially in the region of the jaw, where he was struck. During the month of April he went to a dentist and had some teeth extracted, believing that the pain was the result of the condition of his teeth. The dentist extracted the teeth requested and dismissed him. He noticed that he had a great many badly decayed teeth and that his mouth was irritated. He concluded it was a case of pyorrhea. The extraction of the teeth did not relieve the pain, and in a few days Dr. Vogel was called in. He made an incision on the jaw in the region of the extracted teeth. He attended him for three days and was then dismissed and Dr. O'Neill was called in. On the occasion of his (Dr. O'Neill's) second or third visit he pulled another of his teeth, located in the vicinity of where Dr. Vogel had made the incision, and told *Mrs. McGinty* to wash the sore before he ate in the morning. A swelling developed on the outside of the cheek and Dr. O'Neill opened that. This was some time in June. This came to be a running, suppurating sore on his cheek. About the only treatment administered up until the time of his death, which occurred September 18, 1910, consisted in keeping this sore open and clean. Dr. O'Neill made out a death certificate in which he certified the cause of death to be "injury of head."

Upon his application for the life insurance John McGinty was examined by Dr. O'Neill, who made a certificate of such examination. He wrote into the certificate, in his own handwriting, in answer to a question calling for the information, the fact that John McGinty's father had never had cancer. He also wrote into the certificate the fact that John McGinty had never had syphilis. After John McGinty died, and after the plaintiff had made application for the money upon

the insurance policy, Dr. O'Neill wrote to the defendant company stating that Michael McGinty had died of cancer, and that he had treated John McGinty for syphilis prior to the time of the issuance of the insurance policy to him.

This is the second appearance of this case in this court. It was heard on a prior appeal and will be found reported in 166 Wis. 83, 164 N. W. 249, a reference to which will furnish further details.

We come now directly to the question of whether the record before us contains any credible evidence supporting the finding of the jury to the first question whereby it was determined that Michael McGinty did not die of cancer. Dr. O'Neill was brought forward as a witness for the defendant to prove that Michael McGinty died of cancer. It will be remembered that Dr. O'Neill made out the death certificate in which he certified that the cause of death was "injury of head." Upon the witness stand he testified that in his opinion Michael McGinty died of cancer. When confronted with the fact that he had certified in the death certificate that the cause of death was "injury of head" he said: "Well, in this case I didn't know what the truth was, nor am I positive yet, the cause of death in this case. I supposed it cancer, and by saying it was not I don't see where I lied because I don't know yet whether it was cancer or not." That is the most satisfactory and probably the most truthful statement that Dr. O'Neill made upon the stand, and the most that can be said of his testimony is that he did not know whether Michael McGinty died of cancer.

Four other physicians testified in the case in response to hypothetical questions. Drs. Vogel and Cahoun testified that in their opinion, based upon the hypothetical questions propounded to them, Michael McGinty died of cancer. Dr. Hansberry testified, in response to a hypothetical question propounded to him, that in his opinion the cause of death was blood poisoning. Dr. Evans, a physician from La Crosse, of exceptional experience, testified that from the facts in-

cluded in the hypothetical question propounded to him, which question included all facts disclosed by the testimony in the case, it would be impossible to form an opinion as to the cause of death. So we have the testimony of Dr. O'Neill, the attending physician, to the effect that he does not know what was the cause of death; the testimony of two physicians who are willing to say that the facts proved indicate death by reason of cancer; another physician who says that the facts proved indicate death as a result of blood poisoning; and the testimony of Dr. Evans, a man of broad professional experience, who says that he is unwilling to say what the cause of death was. Upon this state of the evidence it seems clear to us that there was presented a jury question, and that the court was not justified in setting aside the answer of the jury to the first question. In addition to this, the hypothetical questions propounded to the medical witnesses, in nearly every instance, assumed as facts statements concerning which the testimony of Dr. O'Neill constituted the sole evidence in the case. We have no hesitancy in saying that the jury had a right to disbelieve all uncorroborated statements made by Dr. O'Neill, and that in so far as the hypothetical questions included assumptions of fact depending solely upon Dr. O'Neill's testimony the jury had a right to treat such questions as assuming facts not proved in the case.

It is true that while Dr. Hansberry, in response to a hypothetical question propounded to him on direct examination, testified that in his opinion the cause of death was chronic blood poisoning, upon cross-examination he testified as follows:

"*Q.* And if you found a patient in a condition where for no other apparent cause the teeth had become loosened and easily extracted and he was suffering considerable pain and after the extraction of that tooth he wasn't relieved from the pain and that there was a mushroom growth came in soon after the extraction of the teeth, wouldn't you pretty strongly suspect cancer? *A.* With those symptoms, yes."

It should be noticed that this question assumes that a mushroom growth appeared soon after the extraction of the teeth. There is absolutely no evidence in the case of the presence of a mushroom growth except the evidence of Dr. O'Neill, and the jury was not bound to find as a fact that such mushroom growth existed.

In the hypothetical question propounded to Dr. Cahoun it was assumed that the glands in the neck had become enlarged, due to glandular inflammation, and in the hypothetical question propounded to Dr. Vogel it was assumed that "a growth had developed in the inside of the cheek or in the mouth," also that the growth was suppurating, discharging some fluid," also that it "had eaten and worked through the cheek,"—none of these facts were testified to by any other person than Dr. O'Neill. So we have here a state of the record not only where the medical testimony is pretty well balanced as to whether cancer was the cause of death, but the further fact that the opinions of those medical experts who testified that the cause of death was cancer are based upon assumptions of fact not proven by credible evidence. We do not think this record shows conclusively that cancer was the cause of Michael McGinty's death, and the trial court was not justified in changing the verdict of the jury in this respect.

As already stated, the defendant moved to have the answers to questions 2, 3, and 4 changed from No to Yes. The motion was in this respect denied by the court. Defendant has preserved its right to have such action of the court reviewed, and urges that the answers to questions 2, 3, and 4 should have been changed by the trial court because not supported by any credible evidence. We need say no more than that we have carefully examined the record upon the question and are of the opinion that the trial court ruled properly thereon.

Defendant also urges that the trial court erred in refusing to permit Dr. Vogel to testify that he told *Mrs. McGinty,* at

the time of his professional visit, that her husband, Michael McGinty, had cancer. *Mrs. McGinty* had been examined adversely and testified that Dr. Vogel did not make such statement to her. A portion of Dr. Vogel's deposition was then offered in evidence to show that he had made such statement. The court excluded the testimony. We see no theory upon which this testimony could be received. It certainly could not be probative evidence of the fact that Michael McGinty in fact had cancer. Dr. Vogel could not testify to that fact. His knowledge in that respect constituted a confidential communication which the statute prohibits him to reveal. The confidential nature of the communication could not be waived by any one except Michael McGinty himself. *Casson v. Schoenfeld,* 166 Wis. 401, 166 N. W. 23. The privilege of the statute would not amount to very much if the physician were permitted to testify in this indirect manner to facts concerning which he could not give direct testimony. Besides, the jury found that Michael McGinty did not in fact die of cancer. In view of this finding, it is entirely immaterial what Dr. Vogel told her or what her knowledge or belief upon this subject was. The testimony clearly was not admissible, and there is nothing in the opinion on the prior appeal of this case, to which we are referred, indicating that it should have been admitted. In that case it was held that John McGinty had waived the privilege so far as confidential communications between himself and Dr. O'Neill were concerned. This waiver, however, did not extend to confidential communications between his father and his physicians.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment in favor of the plaintiff upon the special verdict.

NELSON, Respondent, vs. CHRISTENSEN, Executor, Appellant.

May 1—May 27, 1919.

Executors and administrators: Claims against estate: Evidence: Interest: Limitation of actions: Computation of period: Accounts: Wills: Services rendered under void contract to devise: Recovery on quantum meruit: Frauds, statute of: Oral contract to devise: Validity: Witnesses: Competency: Conversation with decedent: Appeal: Harmless error: Admission of evidence.

1. In an action to recover against the estate of plaintiff's mother for services and disbursements, plaintiff's testimony as to a conversation between her deceased mother and two others, in which plaintiff took part, was incompetent under sec. 4096, Stats.
2. It being manifest that such incompetent testimony referred merely to a statement which deceased in effect had made repeatedly to others, and which manifestly did not affect the verdict for plaintiff, its admission was not prejudicial error.
3. The evidence in this case is *held* to sustain a verdict finding that there was a contract between a daughter and her deceased mother that the daughter should receive compensation for services rendered and disbursements made by her for the mother's benefit, and that such services were rendered and the disbursements made in reliance on the contract.
4. The mother's oral contract to devise realty in consideration of services and disbursements by the daughter for her benefit is void.
5. One who renders services under an oral contract to devise realty, void under the statute of frauds, must recover on *quantum meruit.*
6. Where the first item of plaintiff's claim against her mother's estate was dated August, 1893, and exhibited items for each succeeding year up to March, 1899, when there was a break until January, 1907, with a detailed claim to 1914, recovery was limited to items accruing within six years immediately preceding the mother's death in November, 1914, where the services were not continuous to the mother's death and where the disbursements did not constitute a mutual running account.
7. The amount recoverable in the circuit court on appeal from the county court's disallowance of a claim against the estate of a decedent is subject to the legal rate of interest from the time of the disallowance.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Modified and affirmed.*

This action was brought by plaintiff to recover $845.31, which she claims is due her from the estate of her mother, Anne Nelson, for services and disbursements.

Anne Nelson, a resident of Racine, died November 9, 1914. Her will bequeathed real estate appraised at $1,700 and personal property valued at $260 to her three children, of whom plaintiff is one. The property, by the terms of the will, was to be divided share and share alike between the three children, and in addition to her share of the real estate *Marie Nelson* was to receive the sum of $200.

Marie Nelson, a milliner, made her home with her mother excepting when she was employed out of town. During the time covered by her claim she lived with her mother as a member of the family, doing housework, supplying a portion of the provisions, and making various disbursements connected with the household. She paid her mother $2.50 a week for board and received nothing for her labor. After her mother's death she contested the latter's will on the grounds that she had lived with her mother and performed services and made various disbursements under an agreement that at the death of her mother she was to receive the entire property as recompense for these services and disbursements. She presents a detailed claim against the estate covering a period of years from 1893 to 1914, inclusive. For the years from 1899 to 1907, however, no claim for services or disbursements is made. The sum of her claim amounts to $845.31. The administrator, besides denying the claim, sets up the statute of limitations as a bar.

The county court disallowed the claim, whereupon plaintiff appealed to the circuit court. There a jury rendered a verdict in favor of plaintiff for $783.41, upon which judgment was entered. The administrator appeals from this judgment.

For the appellant there was a brief signed by *Storms, Foley & Beck,* attorneys, and *William W. Storms,* of counsel, all of Racine, and oral argument by *William W. Storms.*

For the respondent there was a brief by *Thompson, Myers & Kearney* of Racine, and oral argument by *Thomas M. Kearney, Jr.*

SIEBECKER, J. The defendant avers that the court erred in admitting the testimony of plaintiff and of the witnesses Lindhart and Mr. and Mrs. Hanson respecting conversations pertaining to a contract of deceased with plaintiff. The exception is urged upon the grounds that the court's rulings violate sec. 4096, Stats., in that the plaintiff participated in the communications which were had with the deceased. We are of the opinion that the court improperly permitted plaintiff to testify to one conversation between deceased and Mr. and Mrs. Hanson in which plaintiff took part, but it is manifest her evidence refers merely to a statement which the deceased in effect stated repeatedly to others, and manifestly plaintiff's testimony did not affect the verdict. We cannot say that the verdict would probably have been different had this evidence been excluded. The exception to the conversations between decedent and Lindhart and the Hansons upon the ground that plaintiff was present and participated in and influenced them, is not sustained. The situation disclosed indicates that plaintiff did not participate in these conversations and that her presence in no way influenced the decedent in making the statement testified to. It is considered that the court committed no prejudicial error in admitting the evidence embraced in the exceptions urged as error.

It is contended that the court erred in refusing to direct a verdict, for the reason that there is no evidence to support an express contract between plaintiff and her mother for payment for the alleged services rendered by plaintiff and for the disbursements plaintiff claims to have made pursuant to such contract for the benefit of her mother. An examination of

the record shows that plaintiff paid out various sums of money for articles of furniture, house furnishings, for services in and about the decedent's home and upkeep thereof, and for money advanced to pay demands against decedent. The evidence tends to support the claim that these disbursements were made in reliance on a promise of decedent to plaintiff that the title to the house and lot occupied by them as a home should be transferred to plaintiff either by deed or will. The mother failed to transfer the title to plaintiff, and shortly before her death devised it to her children, including the plaintiff, in equal shares.

"Proof of expectation on the one hand to render compensation, and on the other to receive it, is competent evidence, in connection with the facts and circumstances of the case, to give color to them, tending to show that such expectations ripened into a mutual understanding—an express contract." *Estate of Kessler,* 87 Wis. 660, 59 N. W. 129; *Loper v. Estate of Sheldon,* 120 Wis. 26, 97 N. W. 524.

We think the evidence sufficient to sustain the verdict finding that there was a contract between plaintiff and the decedent that plaintiff should receive compensation for services rendered and disbursements made for the mother's benefit, and that the specified services were rendered and the disbursements made by plaintiff in reliance on the contract.

The account of the plaintiff's claim as presented to the county court shows that the first item bears the date August, 1893, and exhibits items for each succeeding year up to March, 1899. At this point there is a break in the account which continued to January, 1907, in which month two items are charged which are followed by ten items before July 1, 1908; the next item bears the date June 28, 1909. In the light of the fact that the property which it was contemplated to bestow on plaintiff under the contract is real estate and hence the contract is void under the law, plaintiff must be relegated to seek recovery on *quantum meruit* under the rule as established in the foregoing cases. This state of her rights, however, limits her to recovery for such items as accrued

within the six years immediately preceding the death of her mother on November 9, 1914, unless the services were in their nature continuous to the time of the death of the mother and the disbursements constitute a mutual running account. The evidence shows that the claim lacks in both these features and her recovery is necessarily limited to the items which accrued within the six years immediately preceding November 9, 1914. See *Loper* and *Kessler* cases, *supra*. Since there is no dispute as to the amount of the items, we are enabled to modify the judgment by reducing the recovery to the amount of the total of the items proven to have accrued within the last six years of the mother's life. These amount to $382.96. This sum is subject to the legal rate of interest from the time there was a denial of the claim in county court, June 2, 1916, which amounts to $68.57, making a total of principal and interest of $451.53 as damages. The costs allowed the plaintiff in circuit court are $56.46. The full amount to which plaintiff is entitled is $507.99, and the judgment is modified accordingly. As so modified the judgment is affirmed.

By the Court.—It is so ordered.

SAWICKI, Appellant, vs. WULFF, Respondent.

May 1—May 27, 1919.

Judgment: Opening default: Excuse: Inadvertence of counsel: Appeal: Review.

1. The vacation of a default judgment during the term of its rendition is peculiarly within the control of the trial court, and its ruling cannot be disturbed except for an abuse of discretion.
2. Where it appears from defendant's affidavit that she supposed her attorney would appear and protect her interest, but that inadvertently he failed to do so, and that she is advised by her attorney, after a full statement of the facts to him, that she has a valid defense to the action as set out in the verified answer, the court did not abuse its discretion in opening the default during the term.

APPEAL from an order of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action begun February 9, 1918, to recover damages for unlawful detainer. The summons and complaint were personally served upon the defendant, but she did not appear in the action, and on May 6, 1918, judgment for $1,800 (treble damages) and costs was entered against her. Thereafter she moved to set aside the judgment on the ground that there had been no service of process sufficient to give the court jurisdiction of defendant. This motion was denied by the court on August 12, 1918. She then moved upon affidavits that the judgment be set aside and she be permitted to come in and defend. This motion the court granted August 20, 1918, and entered an order accordingly. The order required her to pay the costs of entering the judgment and all subsequent costs, and that the judgment should stand as security for plaintiff's claim unless defendant gave a surety company's bond in the sum of $2,500 conditioned that defendant pay to plaintiff any judgment and costs that may be adjudged against her in the action, and that the case should stand for trial at the then present term without further notice. From such order the plaintiff appealed.

Frank S. Symmonds and *Robert V. Baker,* both of Kenosha, for the appellant.

For the respondent there was a brief by *George W. Taylor* of Kenosha, attorney, and *Alexander H. Heyman* of Chicago, of counsel, and oral argument by *Mr. Taylor.*

VINJE, J. The judgment was vacated during the term of its rendition and was therefore peculiarly within the control of the trial court. *Hansen v. Fish,* 27 Wis. 535; *Servatius v. Pickel,* 30 Wis. 507; *Brown v. Brown,* 53 Wis. 29, 9 N. W. 790; *Boutin v. Catlin,* 101 Wis. 545, 77 N. W. 910; *Smith v. Milwaukee E. R. & L. Co.* 119 Wis. 336, 96 N. W. 823; *Frost v. Meyer,* 137 Wis. 255, 118 N. W. 811; *Weber v. Weber,* 153 Wis. 132, 140 N. W. 1052. Its ruling cannot be disturbed except for an abuse of discretion, and that is

the only question raised by the appeal. *Boutin v. Catlin,* 101 Wis. 545, 77 N. W. 910.

It is apparent from the recitals in the order that the court vacated the judgment because it appeared that justice had not been done, and could not be done without a full hearing and trial. Such conclusion was reached from a full consideration of all the affidavits filed and the proposed verified answer. From the affidavit of the defendant it appears, among other things, that she did not know that any judgment had been entered against her till some time after it was entered and that she took timely steps to have it set aside; that she was informed by her attorney that another action might follow the action of unlawful detainer, but if so she supposed her attorney would appear and protect her interest, but that inadvertently he failed to do so, and that she is advised by her attorney, after a full statement of the facts to him, that she has a valid defense to the action, as set out in the verified answer.

Upon such a showing and under such circumstances we cannot say that the trial court abused its discretion in opening the default. On the contrary, its action was in furtherance of substantial justice.

By the Court.—Order affirmed.

NEMET, Respondent, vs. CITY OF KENOSHA, imp., Appellant.

May 2—May 27, 1919.

Municipal corporations: Maintenance of bath house and bathing beach: Governmental capacity: Extension of waterworks system: Nuisance: Torts: Private business: Liability for injuries: Independent contractors: Inherently dangerous work: Precaution: Liability of city: Appeal: Harmless error: Verdict.

1. A city, in the maintenance of a bath house and bathing beach, acts in its governmental and not in its proprietary capacity.
2. Ordinarily, where work is performed for a municipal corporation by an independent contractor the city is not liable for damages resulting from his acts.

3. While a city, in its governmental capacity as proprietor of a bathing beach, is not liable for the negligence of its agents and officers, nevertheless, being engaged in the business of furnishing water to private consumers, in such respect it acts in a private capacity and is bound to exercise ordinary care, and for failure to do so is liable for injuries proximately caused.
4. Excavation by a city to extend its private waterworks system across its premises, used by the public for bathing purposes, without giving notice of the presence of the danger, constituted a nuisance, and the city was liable for damages proximately caused thereby.
5. If such excavation was so inherently dangerous as to be likely to cause injury to public bathers on its premises, the city was bound to see that precautions were taken to prevent such injury, though the excavation was contracted for by an independent contractor.
6. Under sec. 2829, Stats., in an action against a city for the death of a bather who was drowned at its bathing beach by getting into such excavation, a verdict technically defective as finding the city liable in its governmental capacity, but actually proper as finding it liable solely by reason of acts which it committed in its proprietary capacity, is *held* harmless as to the city.

APPEAL from a judgment of the circuit court for Kenosha county: GEORGE THOMPSON, Judge. *Affirmed.*

Plaintiff brings this action to recover damages for the death of her son by drowning at or near a municipal bathing beach in the city of *Kenosha.* Omitting formal matters and matters not material to this appeal, the facts are briefly as follows: Steve Nemet, a man twenty-three years of age, went with a companion to a private bathing beach on the shore of Lake Michigan, where they procured bathing suits. To the south of the private bathing beach was the bath house and bathing beach maintained by the city of *Kenosha.* Steve, who could not swim, remained near the shore, while his companion went to the end of the pier for the purpose of diving off and swimming ashore. Just before jumping into the water his companion waved to Steve, who was then in water about up to his waist. When his companion reached the shore Steve had disappeared. His companion went to the bath house where they had left their clothes, dressed, and

later Steve's clothes were found locked up. A search was then instituted, and several hours later his body was recovered by the lifeguards. The city maintained a locker room upon the premises owned by it, it being a riparian owner, and operated a bathing beach in connection therewith. The common council of the city of *Kenosha* by formal action had declared its bathing beach open to the general public. There had been constructed across the bathing beach owned by the city of *Kenosha* a trench in which was laid an intake pipe reaching several hundred feet out into Lake Michigan. Next to the shore for a distance of twenty-five or thirty feet the trench had been filled in and appears to have been closed by the action of the waves for some considerable additional distance. At a distance of 100 to 125 feet from the shore the trench had not been filled in, and there was a hole some twelve or fifteen feet deep where the trench had been dug. At the point where the trench began the water was from three to three and one-half feet in depth. At the west end of this hole nearest the shore line was found the body of the deceased. The intake pipe was laid by the city as a part of its waterworks system by private contractors. It does not appear that it was any part of the duty of the contractors to fill the trench in which the water pipe was laid, and at the close of the plaintiff's testimony the court granted a nonsuit as to the contractors. About 100 feet from the shore line and parallel with it was maintained a line of floats three inches in diameter, the lines being about 100 feet in length. The excavation was beyond the line of floats. The water where the floats were maintained was from three to three and a half feet deep. There was nothing to indicate the presence of the hole caused by the digging of the trench. The general line of the excavation was indicated by ranges erected on the shore and out into the lake. It was the claim of the plaintiff that the deceased, while in the exercise of ordinary care and being upon the premises by invitation of the city, had fallen into the hole and drowned; that the death

of the deceased was due to the negligence of the city in maintaining the excavation at or near the bathing beach and in failing to warn bathers of the presence of the hole. There was a special verdict. The jury found that the bathing beach in question at the time Steve Nemet was drowned was not reasonably safe for public bathing by persons in the exercise of ordinary care; that such lack of reasonable safety was the proximate cause of the death of Steve Nemet; that Steve Nemet was not guilty of any want of ordinary care which proximately contributed to his death; and assessed plaintiff's damages at the sum of $2,250. There were proper motions made by the defendant to present the questions raised here, which motions were overruled, and the plaintiff had judgment, from which the defendant appeals.

John C. Slater, city attorney, for the appellant.

Frank S. Symmonds and *Robert V. Baker,* both of Kenosha, for the respondent.

ROSENBERRY, J. There was ample evidence to sustain the verdict of the jury and the judgment of the court if the verdict supports the judgment and if the city under the circumstances is liable.

The defendant's claim is that a municipal corporation is not liable in the performance of a governmental function for the negligence of its officers and agents. It is the settled law of this state that the city, in the maintenance of the bath house and bathing beach in question, was acting in its governmental and not in its proprietary capacity. *Bernstein v. Milwaukee,* 158 Wis. 576, 149 N. W. 382; *Piper v. Madison,* 140 Wis. 311, 122 N. W. 730. See note, 25 L. R. A. N. S. 239. It appears that on the day of the accident, July 15, 1916, the work of laying the intake pipe was still in progress and was being done by an independent contractor. Ordinarily where work is performed for a municipal corporation by an independent contractor the city is not liable for damages resulting from the acts of the contractor. *Kuehn v.*

Milwaukee, 92 Wis. 263, 65 N. W. 1030; *Harper v. Milwaukee,* 30 Wis. 365. It does not appear, however, that there was any clause in the contract by which the contractors were required to fill or guard the excavation. The contract was not offered in evidence and is not before us. But the fact that the motion of the defendant contractors for a nonsuit was granted appears conclusive upon that question.

While the city in its governmental capacity as the proprietor of a bathing beach is not liable for the negligence of its agents and officers, nevertheless, being engaged in the business of furnishing water to private consumers, it is in that respect acting in a private business capacity and it is bound to exercise ordinary care, and for failure to exercise ordinary care it is liable for injuries proximately caused by such failure, to the same extent that a private person or corporation operating a waterworks system would be liable. *State Journal P. Co. v. Madison,* 148 Wis. 396, 134 N. W. 909.

The city in its proprietary capacity contracted for the extension of its waterworks system across the premises used by the public for bathing purposes. It made no provision for the filling of the excavation, and left upon the premises an excavation which under the circumstances constituted a trap. There was no notice given or attempted to be given of the dangerous condition of the premises, due to the excavation. It appears that the beach for several hundred yards above and below the excavation was frequented by the public for bathing purposes. The construction of this excavation at a point adjacent to the grounds used by the public for bathing purposes, without giving notice of the presence of the danger, constituted a nuisance, and the city is liable for the damages proximately caused thereby. 4 Dillon, Mun. Corp. (5th ed.) § 1722. If the work contracted for is so inherently dangerous as to be very likely to cause injury unless certain precautions are taken, the municipality is bound to see that these precautions are taken. 19 Ruling Case Law, p. 1140, note 8, and cases cited.

The most serious question in the case is whether or not the verdict supports the judgment. Question 1 was as follows: "Was the bathing beach in question, at the time Steve Nemet was drowned, reasonably safe for public bathing by persons in the exercise of ordinary care?"

As has already been said, the city is not liable in its governmental capacity for the negligence of its agents and officers. Therefore, as the owner and operator of the bathing beach it would not be liable for the negligence of its officers in failing to erect suitable barriers or signs indicating the presence of the excavation. The negligence for which the city is liable, if liable at all, is for the maintenance of the excavation and for failure to guard it either by signs or barriers. This grows out of acts done by it in its proprietary capacity, and the verdict does not in form submit to the jury the question of the city's negligence in this respect. However, the complaint alleged that the city had caused such excavation to be constructed, had negligently failed to require the contractors to properly guard such excavation, and that the city by its officers had control over the method and manner in which the work was being done by the independent contractor.

The single question litigated upon the trial and the point to which the evidence was directed was the liability of the city for maintaining in an unguarded condition the excavation in question. No other act of negligence was alleged or proved. The undisputed evidence shows that if the city was liable at all it was liable for maintaining the excavation without warning or barriers. In submitting the case to the jury the court gave the following instruction with reference to question 1:

"The law does not require nor does the city undertake to make a bathing beach perfectly safe so that no accident can happen. It is sufficient if the bathing beach was made reasonably safe for public bathing by persons in the exercise of ordinary care, and what is reasonably safe is a question for

the jury under all the circumstances as shown by the evidence.

"So, gentlemen, you will consider all the evidence bearing upon the question, consider the evidence of the depth of the water, the evidence as to the excavations and holes produced by such excavations, the evidence as to the piles or cork line and cofferdam testified to in the case, and all the other evidence bearing upon the question; consider all the surrounding circumstances as shown by the evidence, and then determine from all the evidence in the case, and from the facts and circumstances as disclosed by the evidence, whether or not this bathing beach in question, at the time when Steve Nemet was drowned, was reasonably safe for public bathing by persons in the exercise of ordinary care."

While the verdict is technically defective, it submitted to the jury the only question upon which the liability of the city is predicated, to wit, Was the city negligent in the construction of the excavation near the bathing beach and the maintenance of it without proper barriers or warning? While the verdict in form found the city liable in its governmental capacity, it found it liable solely by reason of acts which it committed in its proprietary capacity, for which it was liable as a private corporation would be; and under sec. 2829, Stats., we must regard the error as nonprejudicial.

By the Court.—Judgment affirmed.

KLEIN, Appellant, vs. BEETEN and others, imp., Respondents.

May 2—May 27, 1919.

Automobiles: Negligence: Burden of proof: Res ipsa loquitur: Evidence: Judicial notice: Admissions: Foundation: Witnesses: Impeachment: Cross-examination: Appeal: Harmless error.

1. When both an apparatus and its operation are within defendant's control, and the accident is one which ordinarily could not happen except by reason either of a defect or negligent operation, a presumption of one or the other arises sufficient, from the happening of the accident, to justify a verdict against defendant.

2. The court cannot take judicial notice that a blow-out of the front tire of an automobile running fifteen miles an hour could not cause the car to run into a ditch alongside the road.
3. It is the duty of plaintiff in a negligence case to affirmatively prove negligence.
4. Where an automobile running fifteen miles an hour on a smooth road suddenly swerved and ran into a ditch, and after the accident a blow-out in the front tire was found, the doctrine of *res ipsa loquitur* did not apply.
5. A question on cross-examination of a defendant whose automobile ran into a ditch, causing the death of one riding with him, "Isn't it a fact that you told V. and several others that you reached over to put up the wind-shield in order to protect the children as far as possible, and you were guiding the car with one hand, and in doing so you ran into the ditch?" was too indefinite for the purpose of impeachment, and an objection thereto was properly sustained.
6. Where the defendant in a negligence case makes admissions to third persons, they can be shown in evidence without laying a foundation in the nature of impeachment.
7. Sustaining an objection to a question asked for the purpose of impeaching defendant could not have been prejudicial where defendant had already denied the fact assumed in the question, and the question referred to admissions made to third persons, who testified in behalf of plaintiff without being questioned with reference to such admissions.

APPEAL from a judgment of the circuit court for Walworth county: GEORGE THOMPSON, Judge. *Affirmed.*

This is an action brought to recover damages for the death of plaintiff's son, alleged to have been caused by the negligence of the defendants. At the close of the testimony the court directed a verdict in favor of the defendants, and from the judgment entered thereon plaintiff appealed.

For the appellant there were briefs by *Michael Levin* and *Joseph G. Konop*, attorneys, and *Glicksman, Gold & Corrigan*, of counsel, all of Milwaukee, and oral argument by *Mr. Walter D. Corrigan* and *Mr. Levin.*

For the respondents there was a brief by *E. L. Von Suessmilch* and *Jeffris, Mouat, Oestreich & Avery*, all of Janesville, and oral argument by *Otto A. Oestreich.*

OWEN, J. The defendants are copartners operating a meat market in the city of Sharon. On the morning of August 10, 1916, the defendant *Iddo Beeten* delivered some meat at a farm house some distance from Sharon with a Ford automobile. Plaintiff's son, Edward Klein, about fifteen years of age, asked and was permitted to ride with him on the trip. While returning, and while on a perfectly smooth turnpike road, the width of the roadway being close to thirty feet, the automobile suddenly turned to the left, ran into the gutter, striking with the front wheels against the outside banks thereof, and causing the overturning of the automobile. The boy was caught under the car and killed. The complaint alleges that

"said defendant so carelessly and negligently managed and operated said automobile, without maintaining the proper outlook and at an excessive rate of speed and so carelessly and negligently managed same as to lose control thereof and run into a ditch on the roadway where the said defendants were driving said automobile, causing said automobile to turn over, thereby throwing the said plaintiff's son in such a manner that the running board of said automobile fell on said plaintiff's son's neck, which caused the said plaintiff's son's death instantly."

There is no direct evidence in the case showing that the defendant *Iddo Beeten* was driving at a high or unlawful rate of speed or that he was guilty of other negligence. The defendant *Beeten* was unable to give any explanation of the cause of the accident other than that the automobile suddenly sheered to the left and went into the gutter. He could assign no reason for its so doing. Something happened so suddenly that he did not know what it was. The car was righted and run to town on its own power. The fenders were bent and the wind-shield was broken. The left-hand front tire was deflated. Otherwise the car was in good condition.

The foregoing are about all the tangible facts disclosed by

the evidence. Plaintiff claims that the doctrine of *res ipsa loquitur* is applicable to the situation and that the case should have been submitted to the jury. This doctrine may be stated to be that when both the apparatus and the operation of it are within the control of the defendant, and the accident is one which ordinarily could not happen except by reason either of defect in the apparatus or negligence in the operation, a presumption of one or the other arises sufficient from the happening of the accident to justify a verdict against the defendant. Liability in this case is not predicated upon any defect of the automobile. Liability is predicated solely upon the negligent operation of the car. The facts proved are, that an accident happened at a place where the road was smooth and in good order. Plaintiff contends that proof of this fact raises an inference of negligence in the operation of the car. When the car was righted, after the accident, the left-hand front tire was found to be deflated by reason of a blow-out of the inner tube. It is not at all beyond the realm of possibility that the accident might have happened by reason of this blow-out. It is claimed on the part of the plaintiff that a blow-out could not have caused the accident unless the car was going at an excessive rate of speed. There is no proof of that fact in the record, and we cannot take judicial notice that a blow-out of the front tire of a Ford automobile running at fifteen miles an hour could not produce an accident such as this. It is familiar knowledge that the blow-out of the front tire of an automobile is a dangerous occurrence, the degree of danger, of course, depending upon the rate of speed, and, we apprehend, somewhat upon the character of the car. So we have here evidence showing simply an accident. Granting that the accident might have been the result of negligent operation of the car, the evidence certainly discloses a possibility that the accident might have been the result of the blow-out.

In *Musbach v. Wis. C. Co.* 108 Wis. 57, 69, 84 N. W. 36, an explosion occurred injuring plaintiff, and the question was whether the explosion occurred by reason of a defect in

a gas pipe or by the negligence of a co-employee in permitting a slight flow of gasoline from a burner after it was extinguished. There was evidence showing that it might have resulted from either. The court said:

"But, conceding the possibility that either such defect or negligence of Wolf was the efficient cause, choice between them could only have been based upon conjecture or guess. There was absolutely no evidence even tending to prove that the gas which exploded came from the basement and not from Wolf's burner. The submission to a jury of such choice has been universally condemned, and by no court more vigorously than by this."

This language is peculiarly applicable to the situation here presented. The jury could have done no more than guess as to whether the accident was the result of careless and negligent operation of the car or of the blow-out. Verdicts cannot rest upon guess or conjecture. It is the duty of the plaintiff to prove negligence affirmatively, and while the inferences allowed by the rule or doctrine of *res ipsa loquitur* constitute such proof, it is only where the circumstances leave no room for a different presumption that the maxim applies. When it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails and it cannot be invoked. *Quass v. Milwaukee G. L. Co.* 168 Wis. 575, 170 N. W. 942.

The plaintiff also sets up a cause of action based on the theory that the deceased boy was unlawfully employed in running errands for the defendants, and that he was so engaged at the time of the accident. There is no proof whatever to the effect that he was in the employ of the defendants or engaged in rendering any service for them at the time, and the action cannot be sustained on that theory.

Appellant claims error because an objection was sustained to the following question propounded to the defendant *Beeten* upon cross-examination:

"*Q.* Isn't it a fact that you told Mr. Vierck, Mr. Young, and several others that you reached over to put up the wind-

shield in order to protect the children as far as possible, and you were guiding the car with one hand and in doing so you ran into the ditch?"

We do not appreciate the materiality of this question. If intended as a basis for impeachment it was unnecessary as well as too indefinite. If *Mr. Beeten* had made any admissions they could be shown without laying a foundation in the nature of impeachment. Besides, *Mr. Beeten* had just denied the fact assumed in the question. Mr. Vierck and Mr. Young both testified as witnesses in behalf of the plaintiff and they were not questioned with reference to any such admission on the part of *Mr. Beeten.* The rejection of the evidence could not have been prejudicial even if the ruling was erroneous.

By the Court.—Judgment affirmed.

KELLNER, Respondent, vs. CHRISTIANSEN, Appellant.

May 2—May 27, 1919.

Automobiles: Highways: Injuries by collision: Negligent operation of automobile: Contributory negligence: Question for jury: Trial: Conduct of counsel: Accident insurance: Special verdict: Evidentiary facts: Issues and their submission to jury: Instructions: Findings of jury: Proximate cause: Evidence: Inspection of documents: Appeal: Harmless error: Production of notice or report to insurer: Form of special verdict.

1. In an action for injuries sustained by plaintiff when struck by defendant's automobile, wherein defendant, over objection, testified that he had notified the insurance company of the accident, the plaintiff had no legal right to have the report or notice produced for his inspection.
2. Evidence that defendant was protected by insurance against the liability complained of was immaterial to the merits of the controversy, and its admission was error.
3. Error in compelling production of defendant's report or notice of the accident to his insurer after his unresponsive answer to an objectionable question stating that he had made the report, could not be attributable to the question and was not prejudicial error.

4. Where the court properly instructed the jury as to the bearing of plaintiff's intoxication on the issues, if they found he was intoxicated, the refusal to submit in the special verdict questions as to whether plaintiff was so intoxicated that his condition proximately produced the injury and whether the injury resulted from mere accident was not error.
5. Refusal of the trial court to submit in the special verdict an inquiry as to whether the injury was the result of mere accident for which no one was responsible was not error, as that inquiry was necessarily included in the questions submitting defendant's negligence and as to whether it was the proximate cause of the injury.
6. The practice of deciding issues in sections by questions covering a part of each issue cannot be approved as good and proper practice, as it tends to subject a trial to the peril of confusing the jury and misleading them into a failure to clearly comprehend the issues and thus to produce mistrials.
7. In an action for personal injuries involving issues of actionable negligence and proximate cause, the submission in the special verdict of questions as to proximate cause which failed to direct the jury's attention to the concrete issue of fact as to whether the negligent speed of defendant's automobile was the proximate cause of the accident, and splitting up the inquiry as to proximate causation by submitting separate inquiries as to the elements of natural result and reasonable anticipation, necessarily led the jury away from the concrete fact whether defendant should have realized that the excessive speed would naturally and probably injure plaintiff, and was erroneous.
8. Mere evidentiary facts, or matters in the nature of a cross-examination of the jury, are not proper subjects for special questions; and ordinarily facts in issue which are really single should not be subdivided or be stated in various forms liable to mislead the jury and result in conflicting answers.
9. Where imperfections in the form of a special verdict as submitted to the jury did not appear to have resulted in an injustice to defendant, against whom there was a judgment, they could not be held to be prejudicial error on appeal.
10. The evidence in this case is *held* to sustain the jury's finding of defendant's want of ordinary care in driving his automobile at a dangerous rate of speed, in the light of the conditions confronting him and having regard to the width, traffic, and use of the highway.
11. In an action for personal injuries sustained by plaintiff when struck by an automobile negligently driven by defendant, the issue of plaintiff's contributory negligence, where the evidence was conflicting, was for the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: EDGAR V. WERNER, Judge. *Affirmed.*

This action was brought by *Mathias Kellner* to recover damages for personal injuries which he claims were inflicted on him by the negligence of the defendant.

On August 15, 1916, *Mathias Kellner* was struck by an automobile owned and driven by the defendant. The accident took place between 7:50 and 8:10 p. m. on a public highway near Somers, Racine county. *Kellner* was walking on the road when the automobile overtook him from the rear. The plaintiff claims that defendant was operating his car at and prior to the time of the accident at a high rate of speed; that he failed to reduce his rate of speed while within 150 feet of and while passing a vehicle going in the opposite direction; that, although it was after sunset, defendant failed to display on the front of his machine a lamp giving a reasonably bright light; that because of the rate of speed at which he was operating his car it was impossible for him to stop it within a reasonable distance. Plaintiff alleges that the automobile struck him on his right leg near the knee; that defendant shortly after the accident took plaintiff to his home in defendant's machine, but ill-treated him in the manner in which he lifted him into his automobile. *Kellner* claims that he has been permanently lamed by the accident, that he has suffered great pain and been put to great expense, and that his earning powers have been greatly diminished.

The defendant denies negligence and alleges contributory negligence on the part of the plaintiff.

By a special verdict the jury found that *Christiansen* was operating his car above a reasonable rate of speed at the time of the accident; that he failed to exercise ordinary care; that such want of ordinary care on the part of the defendant was the proximate cause of plaintiff's injuries; that *Kellner* was not guilty of a want of ordinary care that proximately contributed to his injury. The jury assessed damages at the sum of $3,500.

These issues were submitted as follows:

"(1) Did the defendant, *Christiansen,* at the time the plaintiff, *Kellner,* was injured, operate his automobile at a rate of speed greater than was reasonable and proper having regard to the width, traffic, and use of the highway? *A.* Yes.

"(2) If you answer question number 1 'Yes,' then answer this question: With reference to the rate of speed at which the defendant, *Christiansen,* was running his automobile, and just before the time the plaintiff, *Kellner,* was injured, did the defendant, *Christiansen,* fail to exercise such care as the great mass of mankind ordinarily exercise when acting under the same or similar circumstances? *A.* Yes.

"(3) If you answer question number 2 'Yes,' then answer this question: Was the injury to plaintiff, *Kellner,* under such circumstances the natural and probable result of such course of conduct on the part of the defendant, *Christiansen?* *A.* Yes.

"(4) If you answer question number 3 'Yes,' then answer this question: Ought the defendant, *Christiansen,* under such circumstances, as a person of ordinary intelligence and prudence, to have reasonably foreseen that injury to another person upon the highway may probably follow from such person's conduct? *A.* Yes.

"(5) Did any want of ordinary care on the part of the plaintiff, *Mathias Kellner,* proximately contribute to his injury? *A.* No."

Question 6 covered the subject of damages.

The court found the sum awarded by the jury ($3,500) excessive and reduced it to the sum of $2,500. An order was entered granting a new trial of the action unless plaintiff elected within twenty days to remit the sum of $1,000 and take judgment for the sum of $2,500 and costs. The plaintiff elected to remit $1,000, whereupon judgment was entered in his favor in the sum of $2,500 damages and $161.93 costs. This is an appeal from such judgment.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Arthur B. Doe,* of counsel, all of Milwaukee, and oral argument by *Mr. Doe.*

For the respondent there was a brief by *Nohl & Nohl* of Milwaukee, and oral argument by *Max W. Nohl.*

SIEBECKER, J. It is contended that the court erred in permitting defendant to answer, over objection, the following questions: "Did you make any written report of the accident?" and "To whom did you hand this report?" To the first question the defendant answered: "I notified the insurance company; that is the only one." Upon objection to the second of the foregoing questions plaintiff's counsel addressed this inquiry to defendant's counsel: "Will you produce the report?" which was refused. The court then had the jury retire and heard counsel. When the jury returned the report was exhibited to the witness. It is obvious from what took place that plaintiff's counsel wrongfully assumed that they were entitled to have the report exhibited to them under the proceedings up to this point of the trial. Nothing appeared to make this report a proper subject of inquiry in the case. The claim that plaintiff had a legal right to have the report produced for inspection under the circumstances disclosed, is not supported by the established rules of evidence and procedure. Nothing had developed in the trial making the report competent and material evidence in the case. See *Lehan v. C. & N. W. R. Co., ante,* p. 327, 172 N. W. 787, and *Bell v. Milwaukee E. R. & L. Co., post,* p. 408, 172 N. W. 791.

Another exception is urged to these inquiries of the defendant on the ground that they necessarily required and were intended to disclose to the jury the fact that the defendant was protected by insurance against the liability complained of. The fact that an insurance company was thus concerned in the litigation was immaterial as to the merits of the controversy between the plaintiff and the defendant. Proof of this fact before a jury upon the trial is objectionable and should be excluded under the rule recognized in *Chybowski v. Bucyrus,* 127 Wis. 332, 106 N. W. 833, and

Howard v. Beldenville L. Co. 129 Wis. 98, 108 N. W. 48. Was its compulsory production prejudicial error in this case? The record discloses that the defendant, in response to an objectionable question, gave information of having made the report in an answer that was not responsive to the question put to him. Under such circumstances the disclosure of this fact cannot be attributed to the question propounded by plaintiff's counsel, and plaintiff cannot be held responsible for the consequences of what defendant improperly volunteered to include in his answer.

It is urged that the court erred in refusing to submit in the special verdict inquiries whether or not the plaintiff was so intoxicated that his condition proximately contributed to produce the injury and whether the injuries were the result of mere accident for which no one was responsible. The court properly instructed the jury on the bearing plaintiff's intoxication would have on the issues of the case if they found that he was intoxicated. These instructions made the refusal to submit the special question on the subject immaterial. The inquiry whether the plaintiff's injuries were the result of mere accident for which no one was responsible was necessarily included in the questions covering defendant's negligence and the question of its being the proximate cause of plaintiff's injuries. In view of this, the proposed inquiry was covered by the findings of actionable negligence and proximate cause.

"It had no necessary or proper place in the verdict, under the circumstances, since the facts in issue constituting the alleged negligence and its proximate connection with the injury, rendering it actionable, were covered by proper questions." *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816.

Complaint is made of the form of the verdict submitted by the court. The verdict as framed submits the issue of actionable negligence and proximate causation in four questions. Why this was done is not apparent. The first question covered the entire inquiry on the issue whether or not

the defendant was guilty of driving his automobile at a negligent rate of speed. The only other question pertinent to defendant's connection with the alleged cause of action could be: "Was the rate of speed the proximate cause of plaintiff's injury?" These two questions, submitted with appropriate instruction, would have covered these issues in a direct and simple manner, a practice much to be desired in order to have the controversy readily comprehended by the jury. The practice of dividing issues in sections, as shown in the foregoing verdict, by questions covering a part of each issue cannot be approved as good and proper practice. It tends to subject the trial to the peril of confusing the jury and mislead them into a failure of clearly comprehending the issues for their determination and thus produce mistrials. The question in this verdict on proximate causation aptly illustrates the impropriety of this practice. It fails to direct the jury's attention to the concrete issue of fact whether defendant's driving at a negligent rate of speed was the proximate cause of the accident. The question as submitted on this issue splits up the inquiry of proximate causation by submitting separate inquiries as to the elements of natural result and reasonable anticipation. This necessarily resulted in leading the jury away from the concrete fact whether the defendant ought to have realized that excessive speed of his car would naturally and probably cause the plaintiff an injury. The observations in the *Mauch Case* on the subject are applicable to this case:

". . . Mere evidentiary facts are not proper subjects for special questions, neither are matters in the nature of cross-examination of the jury; nor, ordinarily, should facts in issue, which are really single, be subdivided or be stated in various forms liable to mislead the jury and draw out conflicting answers."

These imperfections in form of the special verdict do not in the instant case appear to have operated to do an injustice

to defendant and hence cannot be held to be prejudicial error on appeal.

The claim is urged that the evidence wholly fails to support the finding of the jury that the defendant was guilty of want of ordinary care in operating his car at a rate of speed greater than was reasonable and proper, having regard to the width, traffic, and use of the highway. The facts and circumstances adduced in evidence bearing on this question cannot be stated in detail here. There is evidence tending to show that the plaintiff and his associate were properly using the road; that before the collision they turned to the side in the right direction to make way for defendant to drive by them; that defendant had observed plaintiff and his companion at a point several hundred feet away from the point of collision. The defendant admits he had ample room on the traveled track to turn out and pass plaintiff. Defendant states he did so turn out, but that plaintiff ran into him. This plaintiff and his companion deny, and state that the defendant struck plaintiff before he had time, in his effort of stepping to the side of the traveled track, to clear the course of defendant's car. These and other facts and circumstances present a state of facts which permits of the conclusion arrived at by the jury in their finding that the defendant was guilty of a want of ordinary care in operating his car at a dangerous rate of speed in the light of the conditions confronting him, having regard to the width, traffic, and use of the highway. The issue of plaintiff's contributory negligence upon all the evidence was clearly one for determination by the jury and its finding thereon must stand.

There is no reversible error presented by the record, and the judgment awarding recovery of $2,500 damages and costs is proper.

By the Court.—The judgment is affirmed.

MALKOWSKI, Appellant, vs. GRAHAM, Respondent.

May 2—May 27, 1919.

Physicians and surgeons: Negligence: Proximate cause: Evidence: Master and servant: Injury to third person: Milwaukee civil court: Costs on appeal.

1. In an action by a husband for loss of his wife's consortium, occasioned by the defendant physician's alleged negligence, the evidence is *held* insufficient to show that defendant was negligent in telling a woman employed by plaintiff to put a hot iron in the bed at the feet of plaintiff's wife, he having a right to rely upon such attendant's knowledge and that she would not so place the iron as to burn the patient.
2. Such direction of the physician did not create the relation of master and servant between the physician and such attendant.
3. Nor was such direction of the physician the proximate cause of an injury arising from the burning of the patient's feet, as the physician could not reasonably have anticipated that an ordinarily prudent person would so place the iron as to burn the patient.
4. In an action instituted in the civil court of Milwaukee county and reversed in the circuit court on the defendant's appeal, it was not error to allow costs in the sum of $10 as motion fees on reversal of the judgment and also the costs incurred in the civil court.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This action was brought by the appellant, *Joseph Malkowski,* to recover damages for loss of his wife's consortium, occasioned by the alleged negligence of the respondent, a physician.

The action was brought in the civil court of Milwaukee county, and the jury returned a verdict in favor of the plaintiff and assessed his damages at $300. Judgment was rendered on the verdict in favor of the plaintiff for $300 damages, and costs. Upon appeal from the civil to the circuit court, on motion and without any new trial in the circuit court, the judgment of the civil court was reversed and judgment entered in respondent's favor dismissing the appellant's

complaint upon the merits and granting respondent costs in the sum of $88.44 against appellant, from which judgment this appeal was taken.

For the appellant there was a brief by *Nohl & Nohl* of Milwaukee, and oral argument by *Max W. Nohl.*

For the respondent there was a brief by *Joseph G. Hirschberg,* attorney, and *Horace B. Walmsley,* of counsel, both of Milwaukee, and oral argument by *Mr. Hirschberg.*

KERWIN, J. The main question is whether the evidence was sufficient to support the verdict in the civil court finding the defendant negligent.

In considering the evidence in this case we are mindful of the established rule that if there is any credible evidence to support the verdict it cannot be disturbed.

The defendant denied practically all the material evidence relied upon by plaintiff. So we shall treat the appellant's evidence as undisputed, since, if it is sufficient to support the verdict, the judgment appealed from must be reversed.

The defendant was called to perform an operation on plaintiff's wife and did so, while Mrs. Malkowski was under the influence of an anæsthetic, and after the operation placed her in bed while she was unconscious. At the time of the operation one Mrs. Lenga was in the employ of plaintiff, or his wife, to take care of plaintiff's children, and at the request of defendant placed a hot stove-lid in the bed to warm it, which it is claimed burned Mrs. Malkowski's feet. Mrs. Lenga was a married woman twenty-five years of age, had two children, was related to plaintiff, and was an intelligent, competent person, but had had no experience as a nurse.

After the operation was performed Mrs. Malkowski remained unconscious for about four hours, and the claim of plaintiff is that her feet were burned during that time by the stove-lid placed in the bed by Mrs. Lenga, and that the defendant was negligent in telling Mrs. Lenga to put the lid, which was too hot, in the bed with Mrs. Malkowski.

The evidence shows that after the operation defendant suggested that something hot be placed in the bed where Mrs. Malkowski was, to warm it for the purpose of relieving the patient from the shock of the operation.

The court below, in reversing the judgment of the civil court, filed an opinion in which he gives the material evidence of Mrs. Lenga as follows:

"Well, the doctor told me to get something hot, to put that in the bed, and I asked him if the irons would do, and he told me, well, put anything as long as it is hot. The doctor went into the other room and he was dressing up; I got some newspaper and put the lid in the paper and folded it up and picked it up, went to the other lady, who was right in the kitchen, told her the doctor told me to put something hot, and I told her that she should feel it; what do I know about it, she says—ask the doctor; I then turned and carried it over to the doctor, who was in the sitting room and was dressing; I waited until he pulled on his coat, I didn't wait long, just held it up to him and he felt and asked him if that was all right, and he says, yes, that is all right; put that in; and I says where, and he says, in the bed at her feet. The first iron I put by her feet." . . .

"*Q.* What did you do with the first iron? *A.* The first iron I put by her feet.

"*Q.* You carried it in and put it by her feet? *A.* By her feet.

"*Q.* Yes, and you agreed with *Dr. Graham* that it was nice and warm, didn't you? *A.* How?

"*Q.* And you agreed with *Dr. Graham* that it was just the right temperature? *A.* I don't understand the first.

"*Q.* That it was not too hot? *A.* Why sure, he told me it was all right, so I put it in.

"*Q.* You knew it was all right too, didn't you? *A.* Well, I wasn't sure, because I asked him if it was all right.

"*Q.* You didn't tell him it was very hot, did you? *A.* Why, I didn't say anything. I just says, if that is all right, that he should feel the iron, and he said it was all right.

"*Q.* And then you put it in at her feet? *A.* Yes, sir. Well, I asked him where to put the iron and he says, put it around by her feet."

There is no evidence in the record that defendant told Mrs. Lenga to put the irons on the feet of the patient. Giving the evidence the most favorable construction for the appellant, it is that defendant told Mrs. Lenga to place the irons in the bed at or around the patient's feet, not upon her feet.

Moreover, Mrs. Lenga was as competent to judge whether the iron was hot enough to burn as was defendant, and was as competent to know that if it was hot enough to burn it should not be placed on the patient's feet. Defendant had a right to rely upon Mrs. Lenga's knowledge and believe that she would not so place the iron as to burn the patient. Whether the iron was hot enough to burn was within the common knowledge of any person of the intelligence and experience of Mrs. Lenga. The negligence, if any, upon the undisputed evidence, was the negligence of Mrs. Lenga, not the negligence of defendant.

But it is insisted that Mrs. Lenga was the agent of defendant and that the relation of master and servant existed. The evidence does not support this theory. Mrs. Lenga was in the employ of plaintiff or his wife.

It is further claimed that defendant was negligent in ordering Mrs. Lenga to place the hot iron in the bed. We have referred to the evidence on this point and it falls short of ordering an iron hot enough to burn placed upon the feet of the patient. The most that can be said in favor of the plaintiff's theory of the evidence is that the defendant told the person in charge of the patient and her children to keep her warm by placing warm or hot stove-lids in bed with her, and, construing this evidence in the most favorable light for the appellant, it could not mean that the iron was to be placed so as to burn the patient. Clearly the defendant could not anticipate that anything of the sort would be done, hence one of the essential elements of proximate cause, namely, reasonable anticipation, was wanting in the proof. The defendant could not have anticipated that an ordinarily prudent and in-

telligent person would so place the iron as to cause the injury complained of, and where there is no evidence to support the essential element of reasonable anticipation proof is not sufficient to make a case. In order to charge the defendant with damages in the instant case it must appear from the evidence produced that the defendant ought to have anticipated that the persons in charge of the patient would place the iron in the bed at such a heat and temperature and in such a position against the body of the patient as to burn her. On this point we are of opinion that there is no evidence sufficient to support the verdict, hence that defendant was not guilty of negligence. *Hansen v. Superior M. Co.* 136 Wis. 617, 118 N. W. 180; *Sorenson v. Menasha P. & P. Co.* 56 Wis. 338, 14 N. W. 446; *Barton v. Pepin Co. A. Soc.* 83 Wis. 19, 52 N. W. 1129; *Wolosek v. Chicago & M. E. R. Co.* 158 Wis. 475, 149 N. W. 201; *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735.

It is further contended that the court below was in error in allowing any costs in the circuit court in excess of $10. It does not appear from the record that any circuit court costs were allowed in excess of $10, motion fees on reversal of the judgment, and this sum was properly allowed. The other costs in excess of $10 were not circuit court costs, but civil court costs, and, so far as appears from the record, these costs were properly taxable in favor of the defendant in the civil court; therefore on reversal of the judgment in the circuit court he was entitled to have them taxed there. *Scheidrer v. A. George Schulz Co., ante,* p. 6, 171 N. W. 660.

By the Court.—Judgment affirmed.

STRANDER, Appellant, vs. McINTOSH and another, Respondents.

May 2—May 27, 1919.

Crops: Contracts for sale: Conditions terminating contract.

1. Sec. 1670*n*, Stats. (ch. 55, Laws 1913), providing that the purchaser of a crop not ready for immediate delivery shall, when it is delivered, pay for its weight at contract price, "without regard to the quality or condition . . . at . . . time of delivery, unless any inferior quality or unsound condition . . . shall be due to the negligence or wilful act of the vendor," and giving the seller the right to recover of the buyer double the contract price as damages on the buyer's refusal or failure to comply with his contract as required by the statute, is, whether considered penal or remedial, a statute requiring strict construction, when made the basis of a claim for double damages.
2. Said sec. 1670*n* did not apply to a contract for sale and purchase, not of the whole of plaintiff's tobacco crop, but of certain definite grades or qualities out of his entire crop, leaving to the future agreement of the parties allowance for damaged tobacco, and providing that, if no such settlement were possible, the contract was to be canceled.
3. Ordinarily parties have the same right to agree that on certain conditions subsequently arising their contractual relationship shall cease as they have to agree on the terms and conditions which shall bind them.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

December 8, 1915, a written agreement was made between the parties as follows:

"This certifies to the sale of 4 acres crop of 1915 leaf tobacco to C. W. Mooney for account of McIntosh Bros. Wrappers and binders at 10 per lb.; fillers tied in hand at 2 per lb.; trash at —— per lb.; damaged tobacco at —— per lb. All the above grades to be stripped and bundled separately. This crop of tobacco is to be examined in shed by the purchaser before receiving. Should it contain any damaged tobacco, the amount of damage to be decided upon by mutual agreement. If settlement cannot be made at this time, contract to be canceled and advance money to be returned to

the purchaser. To be delivered in sound packing condition at Madison. There is no encumbrance on this tobacco. Received $20 in part payment. C. W. Mooney, Buyer. *Erick Strander,* Seller."

Subsequently plaintiff commenced this action against the defendants for damages in double the amount of the contract price and based his right to recover under the provisions of ch. 55, Laws of 1913, which now appears as sec. 1670*n*, Stats., and which reads as follows:

"Any person, firm or corporation transacting business in this state, that shall enter into any contract for the purchase of any crop that is not ready for immediate delivery shall in all cases weigh, or cause to be weighed, the crop so purchased, at or before the time such crop is delivered to the purchaser, or to a common carrier at the direction of the purchaser for shipment, and every such person, firm or corporation shall ultimately make payment in full for all of the crop so purchased according to the weight so ascertained and at the price or amount specified in the contract, without regard to the quality or condition of such crop or portions thereof at the time of delivery, unless any inferior quality or unsound condition of such crop shall be due to the negligence or wilful act of the vendor, subsequent to such purchase, and in case any purchaser shall fail or refuse to comply with his contract as provided in this section, the vendor, in action prosecuted by him to recover for any crop sold to such purchaser, shall recover as damages for such failure or refusal, double the contract price of such crop at the weight thereof when ready for delivery and offered to or accepted by the purchaser."

The complaint further alleged that on March 3, 1916, the crop was ready for delivery and offered to the defendants at their weighing station in Madison and that the defendants refused upon request to weigh or cause to be weighed said crop without any objection to the quality or condition of said crop, and that said crop contained no tobacco of inferior quality or unsound condition due to the negligence or wilful act of the plaintiff, and that the defendants failed and re-

fused to comply with their said contract or to accept said tobacco or to receive the same. That the plaintiff ascertained the weight of said crop and that the same contained 4,152 pounds of wrappers and binders and 624 pounds of fillers, and that according to the contract the price for such would be $427.68, being one half the amount sued for, to wit, $855.36.

The defendants answered alleging that the section above quoted is invalid, void, and unconstitutional. They admitted the purchase of the plaintiff's crop of tobacco of approximately four acres and that the crop was offered to them on March 3, 1916, and that they refused to weigh or cause said crop to be weighed. They allege that subsequent to the making of said contract, at which time the tobacco was hanging in the plaintiff's tobacco shed and had not been stripped or bundled, and on or about February 23, 1916, after such stripping and bundling, defendants caused said tobacco to be examined and found that it had not been stripped and bundled separately but that damaged tobacco had been included in the bundles, and that thereupon there was an agreement, adjustment, and compromise between the parties, as a result whereof the defendants were to take all of the said crop of tobacco at six and one-half cents per pound, and plaintiff agreed to deliver the same to defendants at such price. That notwithstanding such agreement the plaintiff, at the time of offering delivery of the tobacco on March 3, 1916, demanded payment thereof at the price specified in the contract, and that when so offered for delivery it was not in sound packing condition and contained burned or damaged tobacco, and that, as defendants are informed and believe, such damaged condition was due to the negligence of the plaintiff. They further alleged that they were ready and willing to take the tobacco at the price agreed upon under the settlement aforesaid of six and one-half cents per pound, but that plaintiff refused to so deliver such tobacco at such price.

By counterclaim the defendants demanded the return of the $20 paid by them to plaintiff at the time of making of the contract in December.

By stipulation but two questions were submitted to the court: (1) whether the written contract above quoted was within the terms of the statute; and (2) if so, whether such statute was a constitutional exercise of legislative power.

No disposition was made of the disputed issues of fact raised by the pleadings.

The trial court held that the contract was not within the terms of the statute and not subject to its provisions for double damages, and further that the law in question violates constitutional guaranties and cannot be sustained, and directed judgment dismissing the action. From a judgment entered in accordance with the stipulation and such decision the plaintiff has appealed.

For the appellant there were briefs by *Elmore T. Elver* and *Alfred H. Bushnell* of Madison, attorneys, and *J. Henry Bennett* of Viroqua, of counsel; and the cause was argued orally by *Mr. Elver* and *Mr. Bushnell.*

For the respondents there was a brief by *Jeffris, Mouat, Oestreich, Avery & Wood* of Janesville, attorneys, and *J. M. Clancey* of Stoughton, of counsel; and the cause was argued orally by *Mr. Otto A. Oestreich* and *Mr. Clancey.*

ESCHWEILER, J. We are of the opinion that this judgment should be affirmed upon one of the conclusions reached by the trial court, namely, that the contract in this case is not within the purview of sec. 1670*n*, Stats.

Whether this statute be considered a penal or a remedial one, upon which point we express no opinion, in either event it would from its nature require a strict construction when made the basis of a claim for such damages as is made by the plaintiff herein, and his right to such a remedy as he here asks should be clear.

Upon the stipulation and record herein we must neces-

sarily exclude from consideration any extrinsic facts or circumstances surrounding the making of this contract or any suggested reasons why the same was not carried out, and the only light in which this contract can be viewed is the light that shines forth from the document itself.

Upon the face of this contract we are constrained to hold that it is not such a crop purchase as is the subject matter of the law under consideration. It appears to be a contract for certain definite grade or qualities out of an entire crop. This is evident from the fact that the contract provides that if, in that which shall be subsequently tendered or offered for delivery by the seller to the purchaser, there shall be included damaged tobacco, the amount of damage is to be decided upon by mutual agreement. No specific price is fixed by this contract for such damaged tobacco and we are therefore bound to assume that the parties recognized that there was something else to an entire crop of tobacco than the two grades or qualities upon which the definite prices were fixed and agreed to be paid. That parties have the right to bargain for the purchase and sale of parts of an entire crop instead of the whole cannot well be questioned, and if they content themselves with such a contract the court cannot well make it anything else.

They appear to have agreed to sell and purchase certain definitely described separate, and apparently independent, grades or qualities of tobacco, each at a specified and different price, out of a certain crop raised by the seller on his four acres. The term "crop" is used in the contract. It is, however, a general term and must, so far as this contract is concerned, be controlled by the definitely described grades at specified prices.

The contract further expressly provides for its cancellation in case the parties cannot agree as to the amount of damage that shall arise by such subsequently ascertained condition. Ordinarily parties certainly have the same right to agree that upon certain conditions subsequently arising their

contractual relationship shall cease, as well as they have the right to agree upon the terms and conditions which shall bind them.

This affirmance of the judgment of the court below is solely upon the grounds herein indicated, and is expressly without any determination or intimation upon the other question raised and suggested in this case and also passed upon in the court below, as to whether or not this sec. 1670*n* can be upheld as a lawful exercise of legislative power.

By the Court.—Judgment affirmed.

BELL, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

May 3—May 27, 1919.

Negligence: Injury to passenger on street car: Evidence: Res gestæ: Report of accident: Admissions of agent: Physicians: Expert testimony: Basis of opinion: Cross-examination: Reading from medical works: Question for jury: Trial: Special verdict: Question in alternative or disjunctive form: Excessive damages: New trial: Newly discovered evidence: Materiality: Appeal: Review of verdict and judgment: Prejudicial error: Admission of incompetent testimony: In jury cases: In court cases.

1. In an action against a street railway company for injuries to plaintiff's eyes from an explosion of electric light lamps in one of defendant's street cars on which plaintiff was a passenger, caused by contact with defective trolley wires, the question of the correctness of the medical tests by defendant's experts, in view of plaintiff's own testimony that his vision was gone in both eyes, was for the jury.
2. Where defendant's expert, on cross-examination, made a qualified negative answer to a question as to whether he considered a named writer an authority on optic atrophy, a question to him as to whether he remembered having read certain language of such writer, which was then read by plaintiff's counsel, was error, as, under the guise of finding the witness's familiarity therewith, the contents of the work itself would thus be placed before the jury, in evasion of the rule that textbooks or scientific works cannot be read in evidence to the jury.

3. The conductor's report of the accident, made at the end of his run, nearly an hour and a half after the accident, was no part of the *res gestæ*.
4. Such report was not admissible as an admission of a state of facts, or of negligence on the part of the defendant, for an agent of a corporation cannot make such an admission and such reports are made for the information of the principal and are often based largely upon statements of others to the agent.
5. The admission of the opinion of plaintiff's expert, who had examined plaintiff since the accident but who had never treated him, that plaintiff was totally blind in his left eye, based partly upon examination and partly upon subjective symptoms or upon what plaintiff had told him, was error.
6. A physician who treats a patient may give an expert opinion based upon the result of his examination and statements made to him by the patient; but one who does not so treat the patient cannot give such opinion.
7. In cases tried by the court the reception of incompetent evidence will not be held prejudicial unless it is the only evidence supporting some essential feature of the judgment.
8. In jury cases the reception of incompetent evidence is not reversible error unless in the judgment of the court the result might probably have been different had it been excluded.
9. The result reached in the trial court should not be disturbed on appeal unless clearly wrong.
10. Under sec. 3072*m*, Stats., error in admitting the conductor's report of the accident, substantially covered by his testimony, in the reception of the contents of a medical work and of an expert opinion that plaintiff's injury was permanent, in view of the conflict in the evidence, the jury's opportunity to note plaintiff's conduct and appearance and to judge of his credibility, and of a direct conflict in the medical testimony, was not prejudicial error.
11. Special questions to the jury using the words "flash" and "explosion" were not objectionable as being in the alternative or disjunctive form, where the identity of the cause of injury was not in question and where such words were understood by the jury to mean one and the same phenomenon.
12. A verdict of $25,000, awarded to the plaintiff, about twenty-eight years of age at the time of the injury, who had been earning $780 a year and was studious, industrious, and ambitious, for an injury to his eyes resulting in medical expense, pain and suffering, diminished earning power and capacity for enjoying life, and necessitating added care by members of his family or others, was not excessive.

13. A motion for a new trial on the ground of newly discovered evidence as to plaintiff's state of health before his injury, which did not materially alter the facts previously presented, was properly denied.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover damages for personal injuries. January 21, 1917, plaintiff was a passenger on one of defendant's cars; and the complaint alleged that when the car reached the Mason–Jackson crossing some of defendant's trolley wires, heavily charged with electricity, were then defective, broken, hanging down, and out of repair, and were negligently permitted to come in contact with the car; that by reason of said contact and the sudden and violent turning on of the electric current by the motorman, and the defective condition of the electrical appliances of the car, and the overloading of the electric light wires and electrical appliances of the car, the current breaker, electric light lamps or bulbs, and other electrical appliances were caused to explode with great force and violence, causing particles and pieces therefrom to fly with great force throughout the car to plaintiff's face and eyes. That by reason of the striking of said particles and glass into plaintiff's eyes and the flash accompanying the explosion both his eyes were injured so that he became entirely blind in the left eye and partially blind in his right eye, and that he believed said condition to be permanent. He asked damages in the sum of $20,250. At the trial he was allowed, over defendant's objection, to amend the amount asked for damages to $50,000, and before the close of the trial plaintiff claimed he was permanently blind in both eyes. The answer put in issue all allegations as to defendant's negligence and the amount of damages sustained by the plaintiff.

The jury found (1) that plaintiff was injured by an electrical explosion or flash; (2) that the car on which he was a passenger came in contact with a broken overhead wire so as

to conduct electric current in such a manner as to cause such explosion or flash; (3) that defendant was guilty of negligence in permitting the car to come in contact with the wire; (4) that such negligence was the proximate cause of plaintiff's injury; and (5) that he sustained damages in the sum of $25,000.

Judgment in favor of plaintiff was entered upon the special verdict September 5, 1918, and on the 20th of the same month defendant appealed and the record reached this court October 9th. On October 30th the defendant made a motion in this court returnable November 8th to remit the record to the trial court with directions to entertain a motion to set aside the verdict and judgment and grant a new trial because of newly discovered evidence tending to show plaintiff was not totally blind. The motion was denied December 3, 1918. Defendant then made a motion in this court, returnable January 7, 1919, to dismiss the appeal for the same purpose as desired in its former motion upon the same affidavits, which motion was heard and denied on the same day.

For the appellant there were briefs by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *Carl Muskat*.

Henry Mahoney, attorney, and *W. L. Gold* and *W. H. Timlin*, of counsel, all of Milwaukee, for the respondent.

VINJE, J. Owing to the claim of such serious injury to plaintiff's eyes and the large amount of damages asked by him the case was necessarily tried very thoroughly. The result is a printed case of over 600 pages, more than 200 of which are devoted to the medical testimony of the nine doctors that were called, five by the plaintiff and four by the defendant. This statement is made not by way of criticism, but as a reason why no detailed statement of the evidence bearing upon the merits will be included in the opinion. There is some conflict in the evidence as to the cause of the injury and a sharp conflict as to its degree, plaintiff claiming total

blindness in both eyes, and defendant only partially impaired vision at least so far as the right eye is concerned. The evidence has been carefully examined by every member of the court with the result that we cannot say it so preponderates against the finding of total blindness in both eyes that it should be disturbed. Claim is made that the jury did not give due weight to the expert evidence of defendant and especially to the result of its medical tests. Were we triers of the fact we might come to a different conclusion on the subject, but the correctness of the tests, in view of plaintiff's own testimony to the effect that his vision was gone in both eyes, was one for the jury.

Errors in the admission of testimony, in the submission of the special verdict, and in refusing to give requested instructions are urged, and these will be considered in so far as they seem material.

Dr. Beebe was called as an expert by the defendant and plaintiff admitted his qualifications to testify as such. On cross-examination he was asked by plaintiff's counsel if he considered Oppenheim an authority on optic atrophy. On receiving a qualified negative answer and the statement that witness had read a part of Oppenheim's works, he was asked this question:

"Do you remember having read at some time in your reading the following language? 'Great interest is attached to the visual disturbances which are caused by dazzling, by intense illumination of the retina, and especially as recent experience has shown by the effect of light from the electric arc, electric ophthalmia. The affection, which is usually of the nature of scotoma, develops with pain in the eye, photophobia, blepheroclonus, etc., as a rule it usually rapidly disappears, but it may develop into blindness. The result of the ophthalmoscopic examination is negative, or it may show spots in the macular region. And for that authority cite Upto. And less often marked atrophy.' Now, having your attention called to that passage from Oppenheim in his chapter on Visual Disorders, will you, do you, recall ever having read that before?"

The witness stated that he could not recall having read it and that he could not deny that it was a correct statement of what is generally taken to be the effect of dazzling on the human eyes by men skilled in the medical profession. The defendant made seasonable objections to the competency of the admitted evidence, moved to strike it out, and requested the court to instruct the jury to disregard it. Each such effort was met by an adverse ruling. Plaintiff's counsel stated that his purpose in asking the question was to ascertain whether or not the witness was familiar with this passage. Under repeated decisions of our court its admission was error. *Boyle v. State,* 57 Wis. 472, 15 N. W. 827; *Kreuziger v. C. & N. W. R. Co.* 73 Wis. 158, 40 N. W. 657; *Waterman v. C. & A. R. Co.* 82 Wis. 613, 631, 52 N. W. 247, 1136; *Zoldoske v. State,* 82 Wis. 580, 605, 52 N. W. 778. If, under the guise of finding out a witness's familiarity with the contents of medical works, you can read extracts therefrom to him and inquire if he is familiar with them, then you can get the contents of every medical book before the jury. This our court, for good reasons not now necessary to repeat, has declared cannot be done. In *Zoldoske v. State, supra,* p. 605, it said: "Text-books or scientific works cannot be read in evidence to the jury, and the rule cannot be defeated or evaded by getting their contents before the jury by having a witness testify to what they contain," and, it may be added, it cannot be done by asking him if he is familiar with such and such a passage, reading it, for that places the contents of a medical book just as effectively before the jury as though the book itself were introduced. The case of *Ruck v. Milwaukee B. Co.* 144 Wis. 404, 129 N. W. 414, is relied upon by plaintiff as justifying the reception of the evidence. The case does not so hold. Its ruling is to the effect that a witness who has testified to a given opinion may be asked upon cross-examination if he has not formerly expressed or approved of a different or contrary opinion, in that case alleged to have been contained in a published arti-

cle. Such evidence was competent because affecting the probative force of the evidence given by him. Here the only real purpose of eliciting the evidence was to place it before the jury. No claim was made that the doctor had previously expressed any opinion concerning the passage read or an opinion different from that testified to by him in chief, and the ostensible purpose of finding out if the doctor was familiar with the passage was entirely beside any issue that the court or jury was interested in.

The defendant was required by the court to produce for the inspection of plaintiff's attorneys the report of the accident made by the conductor at the end of his run, nearly an hour and a half after the accident. The report was received in evidence over timely objection made by defendant, and its efforts to have it struck out and to have the jury instructed to disregard it proved unavailing. Its reception in evidence was error. *Lehan v. C. & N. W. R. Co., ante,* p. 327, 172 N. W. 787. It was no part of the *res gestæ*. *Steinhofel v. C., M. & St. P. R. Co.* 92 Wis. 123, 65 N. W. 852. It was not admissible as an admission of a state of facts or of negligence on the part of the defendant, for an agent of a corporation cannot make such an admission. *Randall v. Northwestern T. Co.* 54 Wis. 140, 142, 11 N. W. 419; *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 99 N. W. 366; *Garske v. Ridgeville,* 123 Wis. 503, 102 N. W. 22; *Zentner v. Oshkosh G. L. Co.* 126 Wis. 196, 105 N. W. 911. Such reports of accidents are furnished by the agent for the purpose of giving the principal information relative thereto. They are often, as in this case, based in part or largely upon what others tell the maker of the report has happened. If the production of such information gathered by one party can be compelled, there is no reason why the other party cannot compel the production of information gathered by the adversary. In this case plaintiff's attorney stated that he did not know what use he wished to make of the report until he had examined it. Defendant offered to produce it if the

whole of it would be received in evidence, but the offer was not accepted and was subsequently withdrawn, so the case stands as if no offer had been made. Its admission as evidence in chief, as before stated, was erroneous.

Dr. Churchill was called as an expert witness by plaintiff, whom he had examined since the action was begun but had never treated, and he was allowed to give an opinion that plaintiff was totally blind in his left eye, basing such opinion in part upon his examination and in part upon subjective symptoms or upon what plaintiff had told him. This was error. *Stewart v. Everts,* 76 Wis. 35, 44 N. W. 1092; *Abbot v. Heath,* 84 Wis. 314, 54 N. W. 574; *Stone v. C., St. P., M. & O. R. Co.* 88 Wis. 98, 106, 59 N. W. 457. A physician who treats a patient may give an expert opinion based upon the result of his examination and statements made to him by the patient, but not one who does not treat the patient. The reason for the application of different rules to the two cases lies in this: When a patient submits himself to treatment he does so for the purpose of curing himself of the malady afflicting him, and he is desirous to do so, and the presumption is that he will tell the truth to the doctor. If he does not, he knows that not only may a cure not be effected but he may seriously jeopardize his health by giving false information or withholding important information. But when he goes to a doctor for examination for the purpose of having him testify but not treat him, he runs no risk by giving false information and the inducement may be to hide rather than to reveal the truth.

The more serious question arising from the errors just noted is, Has the reception of the incompetent evidence collectively or separately affected the substantial rights of the defendant within the meaning of sec. 3072*m,* Stats. 1917, which provides that no judgment shall be reversed unless in the opinion of the court, after an examination of the entire action, the error complained of has affected the substantial rights of the person seeking to set aside the judgment? The

mandate of this statute was previously and is now contained in sec. 2829, Stats. 1917, and has long been recognized as a judicial rule in this state. *Allard v. Lamirande,* 29 Wis. 502; *Bosworth v. Tallman,* 66 Wis. 22, 27 N. W. 404; *Thorn v. Smith,* 71 Wis. 18, 36 N. W. 707; *LaChapelle v. Warehouse & B. S. Co.* 95 Wis. 518, 70 N. W. 589. The rule is a plain and wholesome one, but is not always easy of application to a particular case. In the ultimate analysis the question of whether an error is prejudicial or not is a matter of judgment and seldom capable of even approximate demonstration. True, in some cases the evidence may be of such a character that it can be practically demonstrated that had the incompetent evidence been excluded the result would have been the same. In other cases no item of competent evidence can be specifically pointed to as neutralizing or outweighing the incompetent evidence, and yet the judgment of the court upon the whole record is that the verdict would probably have been the same had the incompetent evidence been excluded. In cases tried by the court the rule is that the reception of incompetent evidence will not be held prejudicial error unless it is the only evidence supporting some essential feature of the judgment. *Hannah v. Knuth,* 161 Wis. 467, 154 N. W. 985. In jury cases the rule is that the reception of such evidence is not reversible error unless in the judgment of the court the result might probably have been different had it been excluded. *Oborn v. State,* 143 Wis. 249, 126 N. W. 737; *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179. And the result reached in the trial court should not be disturbed on appeal unless clearly wrong. *Mechanical A. Co. v. A. Kieckhefer E. Co.* 164 Wis. 65 (159 N. W. 557) and cases cited on p. 67. Applying these principles to the errors and record before us we reach the conclusion that the errors complained of are nonprejudicial.

As to the report of the conductor, the only substantial item contained in that and not testified to by him on the trial was

the mention of the presence of a broken span wire as the cause of the accident. He explained that by stating, as the fact no doubt was, that the report was made up in part of statements made to him by others; that he did not see a span wire but its presence was reported to him. The jury no doubt understood the situation and based their second finding upon the positive evidence of eye-witnesses who saw the broken span wire.

It is not so easy to show how the reception of the contents of Oppenheim's work and the opinion of Dr. Churchill as to the permanence of plaintiff's injury was neutralized or rendered practically harmless by the evidence of others. There was a sharp conflict in the expert medical testimony as to the extent and permanence of plaintiff's injury. The fact, however, that there was a serious dazzling explosion or flash on the car in question and that plaintiff sustained a serious injury to the left eye and probably to the right one also, is clearly established. He was on the witness stand a great many times during the protracted trial and he testified he was blind; the jury saw him and had an opportunity to note his conduct and appearance and to more correctly judge of his credibility than we have. He said he was totally blind, and the jury no doubt believed him. The medical testimony was in direct conflict even with the incompetent evidence out. In such a situation we cannot say that the result would probably have been different if the errors in the admission of evidence had not occurred, or that the result reached is clearly wrong.

The ruling that the admission in evidence of the incompetent testimony was nonprejudicial disposes of the trial court's failure to grant the motion to strike it out and of its failure to grant the request for instructions to disregard it.

Criticism is made by counsel for defendant that questions 1 and 2 were in the alternative or disjunctive form, and having been answered in the affirmative the verdict is defective because some of the jurors may have concluded there was

a flash and others an explosion, and so no agreement was reached as to what actually occurred, and they cite *Walczakowski v. Milwaukee E. R. & L. Co.* 157 Wis. 191, 147 N. W. 20; *Samulski v. Menasha P. Co.* 147 Wis. 285, 133 N. W. 142, and other cases, to sustain the claim made. It is not necessary to discuss the cited cases because it is evident from the evidence, instructions, and the questions themselves that the words "flash" and "explosion" were used synonymously to indicate the one physical phenomenon that occurred in the car when plaintiff's eyes were injured. The unity or identity of the cause of the injury claimed by the plaintiff was not in question, though the terms "flash" and "explosion" were used interchangeably to denominate it. They were meant and understood by the jury to relate to only one and the same phenomenon, and the questions are therefore not subject to condemnation as being disjunctive or in the alternative in a material sense.

The jury awarded plaintiff $25,000 damages, and we are asked to reduce them because excessive. It appears that plaintiff was about twenty-eight years old at the time of the accident and had been earning $780 a year; that he was of studious and industrious habits and ambitious to get on in life. Cases are cited to us by both sides bearing upon the question and showing a great latitude in the assessment of damages for similar injuries. They are not very helpful in disposing of the question because of the great latitude shown by them. It may be true that the present value of an annuity for plaintiff based upon an earning power of $780 a year is only $11,927.76, but that measures only a portion of his damages—the destruction of his earning power, assumed to be stationary. It takes no account of his medical expenses, pain, and suffering and his diminished capacity for enjoying life, as well as the added care and attention that must be given him by members of his family or others. The amount assessed for the injuries sustained cannot be held excessive.

The motion to remand the case to the trial court with leave

to entertain a motion for a new trial on the ground of newly discovered evidence, in case the judgment is affirmed, we treat as submitted and taken under advisement before the argument upon the merits of the appeal was begun. This motion is based upon substantially the same grounds as the two previous motions denied by this court. The additional evidence claimed to exist as to plaintiff's state of health before the injury does not materially alter the facts previously presented, and the motion is therefore denied.

The assignments of error not specifically treated herein are deemed not well taken.

By the Court.—Judgment affirmed.

ESCHWEILER, J. *(dissenting).* Upon the testimony in this case, the errors pointed out in the majority opinion and what appears in the record subsequent to the trial I am satisfied that there should have been a new trial.

HASSLER and wife, Respondents, vs. SHEETS, Appellant.

May 3—May 27, 1919.

Landlord and tenant: Unlawful detainer: Tender of rent and costs: Dismissal: Appeal: Order or judgment? Review: Order of dismissal.

1. A direction of the civil court of Milwaukee county, in an action for unlawful detainer, that "this action be and the same is dismissed," though in form an order, is in fact and in effect a judgment, and is appealable, being an order of dismissal as distinguished from an order directing judgment of dismissal.
2. Under secs. 3364, 3366, Stats. 1917, a tender by defendant, in an unlawful detainer action, of the rent due and costs of the action, did not entitle him to a dismissal of the action, but by so doing he admitted the allegations of the complaint.

APPEAL from a judgment and order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Plaintiffs began an action of unlawful detainer in the civil court of Milwaukee county. On the return day the defendant appeared and tendered $28 rent due and the costs of the action taxed at $1.60. The court made the following order: "Thereupon the court orders that this action be and the same is dismissed without costs." Plaintiffs excepted to the ruling of the court. There was no answer, no plea accompanied the tender, and there was no trial. The plaintiffs appealed to the circuit court. Upon the record the circuit court reversed the judgment of the civil court, denied the defendant's motion to dismiss the appeal, treated the allegations of the complaint as admitted, and rendered judgment of restitution in favor of the plaintiffs and for costs in the sum of $33.50, the money tendered having been paid to the clerk of the court. From the judgment and order of the circuit court the defendant appeals.

The cause was submitted for the appellant on the brief of *J. E. Wildish* of Milwaukee, and for the respondents on that of *Lorenz & Lorenz* of Milwaukee.

ROSENBERRY, J. While the direction of the civil court is in form an order, it is in fact and in effect a judgment, and an appeal may be taken therefrom. *Spehn v. Huebschen,* 83 Wis. 313, 53 N. W. 550. An order dismissing an action is to be distinguished from an order directing judgment of dismissal. *Sutton v. C., St. P., M. & O. R. Co.* 114 Wis. 647, 91 N. W. 121. The civil court was erroneously of the opinion that payment of the rent due and tender of the costs of action entitled the defendant to a dismissal of the action in unlawful detainer. Proceedings for unlawful detainer are prescribed by ch. 145, Stats. 1917. Sec. 3364 provides:

"After the return of the summons served as above provided, and at the time and place named therein, if the defendant appear he may answer the complaint; and all matters in excuse, justification or avoidance of the allegations of the complaint must be answered specially; and thereupon the

justice shall proceed to hear and determine the action unless he shall adjourn the trial as provided in the next section."

Sec. 3366 provides:

"If upon the trial of any such action the justice or jury shall find the defendant or any of several defendants guilty of the allegations in the complaint the justice shall thereupon enter judgment for the plaintiff to have restitution of the premises, and tax the costs for the plaintiff, and when the action is brought under the provisions of section 3360 shall impose a fine," etc.

The civil court should have proceeded with the trial and awarded judgment as provided by law. In this case the defendant answered none of the allegations of the complaint specially, but by tendering the amount of the rent admitted the allegations thereof to be true. Upon the appeal the circuit court so treated the matter and properly awarded the plaintiffs judgment of restitution of the premises with costs. The judgment of the circuit court is therefore right.

By the Court.—Judgment affirmed.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent, vs. RAILROAD COMMISSION OF WISCONSIN and another, Appellants.

May 5—May 27, 1919.

Public utilities: Street railways: Railroad commission: Action to set aside order fixing rates: Findings of fact: Rate-making: Authority of court: Proceedings to fix: Reasonableness of rate: Evidence: Consideration of federal court proceedings: Consideration of purchase price of separate systems: Change of rate by railroad commission: Rescission: Legal rate.

1. Under sec. 1797—16, Stats., providing that in actions to set aside an order of the railroad commission fixing rates the burden of proof shall be on the plaintiff to show that the order is unlawful or unreasonable, a general finding by the court that street railway fares fixed by the commission were unreasonable is sufficient; and sec. 2863 does not require findings of the fundamental facts upon which the ultimate conclusion of unreasonableness is based.

2. While an order of the railroad commission fixing street railway rates may be attacked in the courts as unreasonable, the power to fix future rates is not a judicial one.
3. Where the railroad commission, after making an order fixing street railway fares, thereafter rescinded the same in a new proceeding on the ground that the rate was then unreasonable, the court cannot, under secs. 1797—14 to 1797—16, in a proceeding in which the rate first fixed was attacked, treat the rescission by the railroad commission as having voided the rate *ab initio*. If that were permitted there would be no certainty as to when a legal rate was in force.
4. In an action to set aside an order of the railroad commission requiring a street railway company to sell tickets in packages of thirteen for fifty cents instead of six for twenty-five cents, the evidence is *held* to show that from the time the order was entered in August, 1912, the rate fixed was not reasonable.
5. A reasonable rate of street railway fares is a rate which yields a fair return on the value of property necessarily employed over and above expenses and depreciation; and a rate of seven and a half per cent. is a fair return.
6. When the state asserted and put into operation the power to fix rates and fares by means of a railroad commission, the commission was not bound in its estimate of value by the conclusion reached in an action previously brought in the federal court against a city in which the street railway company whose rates were involved was operated.
7. The railroad commission, in fixing rates charged by a street railway company, is not bound, in determining the capital of the company, to allow the amounts paid by it in purchasing separate systems of which its system was composed.

APPEALS from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This action was brought in the circuit court for Dane county in September, 1912, to set aside an order of the defendant *Commission* made August 23, 1912, requiring the plaintiff to sell street railway tickets in packages of thirteen for fifty cents, instead of six for twenty-five cents as theretofore. The claim then made by the plaintiff was that the order was void because it violated the terms of the city ordinances regulating fares, which ordinances were claimed to be contracts and hence not subject to change by subsequent legislation. This court held to the contrary upon the first

appeal in this case (153 Wis. 592, 142 N. W. 491), and the decision was affirmed by the supreme court of the United States (238 U. S. 174, 35 Sup. Ct. 820). The case then went back to the trial court and the complaint was amended so as to challenge the reasonableness of the *Railroad Commission's* order upon the merits, and a trial has been had. At the time of the commencement of the action in September, 1912, the trial court issued a temporary injunctional order suspending the operation of the *Commission's* order, but requiring as a condition that the plaintiff issue coupons for the additional tickets required to be issued by the order and give a bond to redeem the coupons so issued if the *Commission's* order should finally be held valid. This was done, and a large number of such coupons have been issued and depend for their value upon the outcome of this case.

Much testimony, both oral and written, was introduced upon the trial of the present case in addition to the testimony received by the *Commission* upon the original hearing, and among other things there was introduced the record of a proceeding instituted before the *Railroad Commission* in December, 1914, by one Chris Woehsner, mayor of the city of Cudahy, against the plaintiff and the Milwaukee Light, Heat & Traction Company, a closely allied corporation which operates suburban and interurban lines running out of Milwaukee in connection with the plaintiff's urban lines in Milwaukee, charging that the order of August 23, 1912, was unreasonable and asking for a modification thereof so as to provide that the earnings of the Milwaukee Light, Heat & Traction Company be considered in connection with those of the plaintiff company and that upon such combined earnings the plaintiff be awarded a fair and reasonable return. The record showed that on January 30, 1915, the *Railroad Commission* made a decision in this case (hereinafter called the Woehsner Case) and ordered that the order of August 23, 1912, directing sale of thirteen tickets for fifty cents, "is hereby rescinded." Other testimony introduced on the trial

will be referred to in the opinion. At the close of the evidence the parties stipulated that the record need not be returned to the *Railroad Commission,* as required to be done by sub. (b), sec. 1797—16, Stats., unless the parties stipulate to the contrary. The trial judge made a single finding of fact, to the effect that the order of August 23, 1912, requiring the sale of thirteen tickets for fifty cents is unreasonable, and directed judgment setting aside and abrogating the same and providing that the injunctional order be made permanent and that all coupons issued pursuant to the temporary injunctional order be canceled and declared of no force or effect. From judgment entered in accordance with this order the city of *Milwaukee* and the *Railroad Commission* separately appeal.

On the original argument, November 8, 1918, there was a brief for the appellant *Railroad Commission* by *Spencer Haven,* attorney general, and *Walter H. Bender,* deputy attorney general, and oral argument by *Mr. Bender.*

Clifton Williams, city attorney, for the appellant *City of Milwaukee.*

For the respondent there was a brief by *Miller, Mack & Fairchild* of Milwaukee, attorneys, and *Sullivan & Cromwell* of New York, of counsel, and oral argument by *Edwin S. Mack.*

On the second argument, May 5, 1919, there was a brief for the appellant *Railroad Commission* by *John J. Blaine,* attorney general, *M. B. Olbrich,* deputy attorney general, and *Walter H. Bender* of Milwaukee, special counsel; and the cause was argued orally by *Mr. Bender.*

Clifton Williams, city attorney, for the appellant *City of Milwaukee.*

For the respondent there were briefs by *Miller, Mack & Fairchild* of Milwaukee, attorneys, and *Sullivan & Cromwell* of New York, of counsel, and oral argument by *Mr. Clarke M. Rosecrantz* of New York and *Mr. Edwin S. Mack* of Milwaukee.

WINSLOW, C. J. It is very vigorously claimed by both of the appellants that the single finding of fact made by the court to the effect that the order of August 23, 1912, "is unreasonable" is not a response to sec. 2863, Stats., which requires that upon trial of an issue of fact by the court the judge shall state in his decision "the facts found by him." It is argued that the court should under this provision make findings of the fundamental facts upon which the ultimate conclusion of unreasonableness is based, such as (1) the fair value of the property used by the plaintiff in its business, (2) the reasonable rate of return thereon, and perhaps other facts, such as the amount of the original investment, the cost of reproduction, the going value, the rate of depreciation, etc.

The argument is not without considerable weight, and it is beyond question that it would simplify the question arising on the appeal and make the work of this court easier if the fundamental facts, upon which the ultimate conclusion of unreasonableness is based, were stated. However we are unable to convince ourselves that such was the intention of the lawmaking power. This action is a purely statutory action, created by the railroad commission law for the sole purpose of providing a court review of an order of the *Commission* regulating railroad rates or service to determine whether the order is unlawful or unreasonable.

Sub. (e), sec. 1797—16, Stats., provides for the bringing of the action, and declares that "in all trials under this section" the burden of proof shall be upon the plaintiff "to show by clear and satisfactory evidence that the order of the commission complained of is unlawful, or unreasonable, as the case may be." The court is nowhere directed or empowered to find the lawful or reasonable rate; indeed the power to fix future rates is not a judicial power, though the power to determine whether existing rates are reasonable is judicial in its nature. *Madison v. Madison G. & E. Co.* 129 Wis. 249, 108 N. W. 65.

The court must be convinced that the rate fixed in the order is unlawful or unreasonable, but it is neither required nor expected to find what rate would be reasonable. The fact to be found is a single negative fact, not a number of affirmative facts. We think, therefore, that the single finding of unreasonableness in the present case satisfies the calls of the statute.

The next claim made by the appellants is that the trial judge based his decision, not upon the evidence before him, but upon the supposed fact that the order in the Woehsner Case rescinded the order of August 23, 1912, *ab initio,* and thus deprived the last-named order of the statutory presumption of reasonableness.

That the trial judge did this very thing cannot be doubted. In a written opinion filed he said:

"The order directing the sale of thirteen tickets for fifty cents was based upon the *Commission's* forecast of the future. The order in the Woehsner Case was based upon the actual results of operation under the order. The finding of the *Commission* that the order directing the sale of thirteen tickets for fifty cents was unreasonable and that it "would not have been made" if the *Commission* had understood the nature of the changes then in progress in connection with plaintiff's business, is '*prima facie* lawful and . . . reasonable.' Sec. 1797—15, Stats. That finding must stand until it is shown 'by clear and satisfactory evidence' that it is 'unreasonable or unlawful.' Sub. (e), sec. 1797—16, Stats. If upon the record the order in the Woehsner Case is such that 'reasonable men might well differ with respect to its correctness, (it) cannot be said to be unreasonable.' *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 165, 116 N. W. 905.

"If the court cannot say that the order in the Woehsner Case is unreasonable, then the finding of the *Commission* in that case takes from the order here in question the statutory presumption of reasonableness. That presumption is based on the sanction which a finding of the *Commission* gives to it. When that sanction is taken away by the action of the *Commission* in vacating its former order and determining that such order is unreasonable, the former order is no longer

supported by such statutory presumption. It is manifest that the court cannot sustain both orders of the *Commission*. If the statutory presumption in favor of the order in the Woehsner Case is not overcome by clear and satisfactory evidence, the order in the Fare Case must be held to be unreasonable, as the *Commission* has found it to be."

The judge then takes up the question whether the evidence shows that the findings in the Woehsner Case are unreasonable and concludes that it does not. On this line of reasoning the conclusion necessarily followed that the order in the Woehsner Case wiped out the order of August 23, 1912 (called the order in the Fare Case), and left the court nothing to do but to declare it unreasonable and set it aside.

To our minds this is an erroneous interpretation of the statute. Both orders may be upheld and both undoubtedly have the statutory presumption of reasonableness. The scheme of the statute is that when the *Commission* in a proper proceeding makes an order regulating fares, that order conclusively determines the lawful and reasonable rate at the time the order is made, except that it may be reviewed by action brought within ninety days, as the present action was brought.

It is not provided or contemplated that the order may be reviewed in another and different proceeding before the *Commission*, that is, reviewed as to its reasonableness *at the time it was made*. Of course upon complaint made at any time to the *Commission* the subject of the present reasonableness of the rates may be examined and new rates fixed, but this does not mean that the previous order is to be declared void *ab initio*. Up to the time the new order is made the rates fixed by the original order are lawful and the making of the new order simply substitutes another rate as the lawful one from that time onward. This seems to us so clear from a study of the statute (secs. 1797—14 to 1797—16, inclusive) that we shall spend no further time upon the proposition.

The provision that the *Commission* may "rescind" an or-

der fixing rates previously made by it is manifestly not to be construed as retroactive, that is, that the previous order is to be made void from the beginning. The word "rescind" may have such a meaning, but its more frequent meaning is, to presently nullify, repeal, or vacate. To give it the retroactive meaning contended for would mean that neither carrier nor patron would ever know whether rates were legal or not. A rate supposed by both parties to be legal one year might be discovered to be illegal the next year, with the resulting consequences of liabilities for amounts overpaid or deficiencies in payment, which again would be liable to be upset in the following year.

The question before the circuit court was whether the evidence before it clearly and satisfactorily showed that the order of August 23, 1912, was unlawful because unreasonable when made. It would doubtless be entirely competent for this court to send the case back to the circuit court to pass upon this question specifically before passing upon it here; but this case has been pending many years and it seems that public and private interests require that there should be as speedy an end of this litigation as possible, and, as the evidence is all before us, we have concluded to examine it and ascertain whether it justifies the conclusion that the order in question was unreasonable when made. It may be remarked in passing that if it fixed an unreasonably low fare it was unlawful because the fare must be a reasonable fare.

This examination convinces us that it is not shown by clear and satisfactory evidence that the order of August 23, 1912, was unlawful or unreasonable when made. A reasonable rate is a rate which yields a fair return on the value of the property necessarily employed over and above expenses and depreciation, and a return of seven and one-half per cent. has been approved by this court. *Duluth St. R. Co. v. Railroad Comm.* 161 Wis. 245, 152 N. W. 887.

Reference to the report of the proceeding which culminated in the order in question here (found in 10 Wis. R. R.

Comm. Rep. 1–305) will show that the *Commission* then figured the company's total investment in 1911 to be $10,900,889 and its surplus of income for that year to be $1,436,847.61, making an excess of $619,280.94 over and above a seven and one-half per cent. return upon the investment (p. 243). From this surplus the *Commission* calculated that there should be deducted a sum not exceeding $416,469 for wage increases, extension of single-fare privileges, and various other losses and increased expenses likely to follow in the near future (p. 247), leaving a net probable surplus for 1912 over and above the seven and one-half per cent. return on the investment of more than $200,000. They then calculated that the reduction of revenue resulting from the sale of thirteen tickets for fifty cents, instead of twenty-five tickets for $1 as theretofore, would amount to $171,784, which being deducted from the net surplus would still leave the seven and one-half per cent. return on the investment intact.

The respondent company very vigorously claims that the investment valuation should have been very largely increased. Any detailed or exhaustive treatment of this subject would involve many pages of discussion of facts and tabulation of figures. The subject was treated very thoroughly by the *Commission* in its report of the case, covering more than 300 pages, and we shall content ourselves here with saying that the conclusions of the *Commission* in this respect were founded on ample evidence and cannot now be set aside. The claim that the *Commission* was bound in its estimate of value by the conclusions reached in the action brought in the federal court in 1898 by the plaintiff against the city of *Milwaukee* to declare an ordinance fixing fares confiscatory (87 Fed. 577) cannot be entertained.

When the state asserted and put into operation its power to fix rates and fares by means of the *Railroad Commission* it manifestly started with a clean sheet and was not hampered by the results of any previous litigation between the

company and the city. Nor was the *Commission* bound to allow amounts paid by the plaintiff in purchasing the five separate railways of which the plaintiff's system is composed. Such amounts do not necessarily represent fair or actual values.

It appears by the evidence that in the summer of 1913 the *Railroad Commission* of its own motion instituted and conducted an investigation with reference to the service on the plaintiff's city lines, which will be found reported in vol. 13 Wis. R. R. Comm. Rep. pp. 178–245. In their report of this case, at page 239, will be found tables showing the earnings and operating expenses of the plaintiff during the years 1912 and 1913. From these tables it appears that they figured the fair value of the property in 1912 at $11,600,000, upon which there was a surplus of earnings, after payment of expenses, of $1,304,798.54, being an excess of $434,798.54 over and above seven and one-half per cent. return on the value; and that in 1913, on a valuation of $12,000,000, the excess over and above the seven and one-half per cent. was $297,803.60. In this case the *Commission* say (p. 240): "It is difficult to see in what respects the *Commission* went further in the Fare Case than was its plain duty under the circumstances." More than a year later the Wehsner Case (15 Wis. R. R. Comm. Rep. 724–751) came before the *Commission,* and at this time there came to the attention of that body a number of new facts. It is said in this case (p. 734), "the *Commission* still believes that under the existing conditions and the knowledge at hand up to December 31, 1911, the above rate [*i. e.* the rate fixed by the order of August 23, 1912] was fair to the contending parties."

The *Commission* then proceeds to state the factors which have contributed to the changed conditions which "exist at the present writing" and which in their judgment call for abrogation of the order of 1912. The most significant of these is the additions to the physical property, which during the years from January 1, 1911, to January 1, 1914,

amounted to $4,512,818, or an increase of forty-three per cent., during which time the gross revenues remained practically stationary at a little more than $4,000,000, in fact showing a slight falling off in 1914 from the previous year. Of these additions about $1,000,000 was expended in 1912 and nearly $1,600,000 in 1913. Other factors noted by the *Commission* were (1) the increased demands of the city for paving between the tracks, which were $91,611 in 1912 and rose to $358,758 in 1913; (2) the higher relative cost of maintenance of property; (3) the increase in wages of labor, expense of supervision, and overhead charges; (4) the more extended use of transfers by reason of the opening of cross-town lines, causing an estimated loss in revenues for the year 1914 alone of $80,000; (5) the depressing effect of the extensive use of automobiles, causing an estimated loss in revenue in 1914 of somewhere from $122,500 to $245,000; and finally the effect of the order of August 23, 1912, itself.

We shall not attempt to discuss these factors in detail nor do we here intimate that they were sufficient to justify the *Commission* abrogating the order just referred to at any time. It appears that in 1918, in a proceeding brought before the *Railroad Commission* by the plaintiff here, an order was made still futher raising the fares on the plaintiff's lines by ordering the discontinuance of the sale of tickets at the rate of six for twenty-five cents, and the validity of this order has been challenged in an action which is now in this court on appeal and soon to be heard.

It is sufficient now to observe that the evidence does not make it clear that the order of August 23, 1912, was in any respect unreasonable when made. The conditions then existing appear to have quite fully justified the making of the order. The factors which are claimed to have made the rate of fare then fixed unreasonable are changed conditions which came in after the making of that order, principally during the years 1913 and 1914. Whatever may have been the effect of the changed conditions on the question of the

present reasonableness of the order, they do not establish the fact that it was unreasonable when made.

By the Court.—Judgment reversed, and action remanded with directions to affirm the order of the *Railroad Commission,* with costs in favor of the city to be taxed against the plaintiff.

OWEN, J., took no part.

ESTATE OF EBELING: STATE and another, Appellants, vs. EBELING, Executor, and others, Respondents.

May 5—May 27, 1919.

Taxation: Tax on transfer of property: Gifts: Power of legislature: Inheritance taxes: Gifts in contemplation of death: Material part of estate.

1. Sec. 1087—1, Stats., as amended by ch. 643, Laws 1913, which provides that gifts of a material part of a donor's estate, made within six years prior to his death, shall be construed to have been made in contemplation of death so far as transfer taxes are concerned, constitutes a legislative definition of what is a transfer in contemplation of death, and not a mere rule of law making the fact of such gifts *prima facie* evidence that they were made in contemplation of death.
2. Whether gifts so made are held to be gifts in contemplation of death or gifts *inter vivos,* they are within the taxing power of the legislature.
3. The determination as to whether a gift constitutes a material part of the donor's estate is a judicial question, to be decided in each case as it arises.
4. Occasional gifts of $500 or $1,000 made by a donor possessing an estate of more than $332,000 do not constitute a material part of his estate and are not taxable; but gifts of $10,000 to each of his three children in June, $5,000 to each in August, and $10,000 to each in October, amounting to more than $75,000, constitute a material part of his estate and are taxable.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Reversed.*

The county court of *Brown County,* in determining the amount upon which inheritance taxes imposed upon the es-

tate of John H. Ebeling, deceased, should be computed, deducted the amount of the federal estate tax imposed upon the estate, and determined that certain gifts made by decedent within six years prior to his death were not subject to an inheritance tax. The state and county appealed from the judgment to the circuit court for *Brown County,* where the judgment of the county court was affirmed. From such judgment the state and county appealed.

The estate was valued at $332,819.33; $12,779.37, the amount of the federal estate tax, was deducted from this amount in determining the amount upon which the inheritance tax should be computed. The deceased died January 15, 1918. He had three children. Within six years prior to his death he made gifts to them as follows: December 22, 1912, $1,000 to each; November 22, 1912, $1,000 to each; October 31, 1913, $500 to each; December, 1913, $200 to each; May, 1916, $500 to each; June 30, 1917, $10,000 to each; August 18, 1917, $5,318.33 to each; and October 1, 1917, $10,000 to each.

The court found that neither of said gifts nor all of them combined constitute a material part of the estate of said testator; that neither of said gifts nor all of them together was or were made in the nature of a final disposition or distribution of said testator's estate; that no one of said gifts was made by said testator in contemplation of death; and further, that if the law raised any presumption as to any of such gifts that they were made in contemplation of death, said presumption is fully overcome by the evidence in the case.

For the appellants there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *William Cook,* district attorney, and oral argument by *Mr. Brossard.*

Samuel D. Hastings of Green Bay, for the respondents.

OWEN, J. It has been held in *Estate of Week, ante,* p. 316, 172 N. W. 732, that the federal estate tax is not a proper deduction in determining the amount upon which the

state inheritance tax should be computed. The county court erroneously allowed this deduction.

Prior to the enactment of ch. 643, Laws 1913, sec. 1087—1, Stats., imposed a tax upon three classes of transfers of property: (1) by will; (2) by intestate laws; and (3) by gifts made in contemplation of death of the donor or intended to take effect in possession or enjoyment at or after such death. Ch. 643, Laws 1913, amended this section by adding at the end of sub. (3) the following:

"Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."

The state contends that the amendment makes every gift of a material part of the estate of a deceased person, when made within six years prior to death, subject to an inheritance tax. It is the contention of the respondents that the amendment does not have such conclusive effect, and that it accomplishes no more than to make the gift, when made within six years prior to death, *prima facie* evidence of the fact that it was made in contemplation of death, thereby shifting the burden of proof upon that question.

In the case of *State v. Thompson,* 154 Wis. 320, 142 N. W. 647, this court had under consideration the question of inheritance taxes due from the estate of one Joseph Dessert, who died at the age of ninety-two. Practically his entire estate was devised to his only daughter and sole heir, Stella D. Thompson. She took by the will about $200,000. During the last six years of his life he gave her approximately a half million dollars, mainly in two gifts, one made three years and the other four and one-half years prior to his death. This court held that the gifts were not subject to inheritance taxes. The circumstances of that case forcibly

brought to the attention of the legislature the fact that after a person had attained the age of eighty-nine years, an age when he could not expect to live many more years, when his thoughts, naturally, were consumed rather with the disposition of property already accumulated than with the accumulation of more, he could bestow his property upon the objects of his bounty and thus evade the inheritance tax. This decision was rendered May 31, 1913. The legislature was then in session. Ten days thereafter Senate bill No. 575 was introduced by the Joint Committee on Finance. This bill, without amendment, was approved July 21st and became ch. 643, Laws 1913.

Now the question is this: Did the legislature intend to make gifts and transfers of property, made within six years prior to death, absolutely taxable, or was it simply providing a rule of evidence? There can be little doubt that the legislation was prompted by the decision in the *Thompson Case.* That was a case in which the state was a party. It was regarded as an important case, not only because of the amount involved but as a precedent. The contention of the state was rejected by the court. It seems quite reasonable to suppose that the legislature in enacting the amendment intended to do what it could in the way of moulding into law the doctrine contended for by the state in that case. If it intended to make the gift or transfer occurring within six years prior to death only *prima facie* evidence of the fact that it was made in contemplation of death, the legislative response was certainly weak and puerile. In cases where the facts are easily ascertainable the burden of proof is of the merest advantage. It is only in cases where the proof is difficult to obtain, such as violations of the excise laws, where a rule of law constituting certain evidence a *prima facie* case is of real advantage. With such a construction the amendment would not have changed the result of the *Thompson Case,* and we may well believe that the purpose of the legislature was to prevent such a recurrence.

It is clear to our minds that the legislature intended to define what should constitute a transfer in contemplation of death. It was the legislative purpose to make the statute effective. It realized that if a person after reaching the age of eighty or ninety years could dispose of his property free from the tax, it could be easily evaded by those possessing the larger fortunes. So it was enacted not only that the tax should apply to gifts made in contemplation of death but to gifts made within six years prior to death.

It is said that the legislature cannot declare a gift to be in contemplation of death when it in fact is not so. It is admitted, however, that the legislature may tax gifts *inter vivos.* Whether these gifts, therefore, be held to be gifts in contemplation of death or gifts *inter vivos,* they are not beyond the power of the legislature to tax. If they be considered gifts *inter vivos* there is abundant justification for the classification here made in segregating them from other gifts *inter vivos* as objects of taxation, the basis for such classification being the purpose to make the law taxing gifts made in contemplation of death effective. It is recognized that in enacting a police regulation it may be found necessary to include within the purview of the statute certain acts innocent and not in themselves a subject of police regulation where the inclusion of such acts is necessary, in the opinion of the legislature, to make the police regulation effective. *Pennell v. State,* 141 Wis. 35, 123 N. W. 115. While a principle relating to police regulation does not necessarily apply to the power of taxation, no reason is perceived why the legislature may not, as here, make a classification of gifts *inter vivos* and subject them to taxation for the purpose of making effective taxation of gifts *causa mortis.* That it will occasionally result in the taxation of gifts not in fact made in contemplation of death, which may be conceded, should not condemn the classification if the classification be reasonably necessary to carry out the legislative scheme for the taxation of gifts *causa mortis.* Nor should it be condemned

because there is no material distinction between those who fall immediately upon one side of the line and those who fall immediately upon the other, as illustrated by the fact that a gift one day less than six years prior to death is taxable, while a gift made one day more than six years prior to death is not taxable. That is always the case where the classification is of necessity fixed by an arbitrary line of demarcation. As said in *State v. Evans,* 130 Wis. 381, 110 N. W. 241:

"Neither need we be disturbed by the fact that the line of demarcation between the classes is arbitrary. Wherever there is a sliding scale of age, population, dimension, distance, or other characteristic which is believed to justify classification, necessarily the division between classes must be arbitrary, and legislation is not to be declared void which adopts the age of twenty-one as marking the right to vote or manage property because the individual at twenty years and eleven months may be as competent as at twenty-one, nor, in a law distinguishing by population, because no appreciable difference can be conceived between the town of 999 and the town of 1,000, provided, generally, the class of those under twenty-one years of age are less competent to vote or manage property than the class of mankind above that age, or the class of towns which do not include villages of 1,000 population are generally less in need of the governmental powers conferred upon villages than the class of towns which do contain villages of 1,000 and upward."

The next question is whether these gifts, or any of them, constitute a material part of the donor's estate. Obviously the law would be easier of administration if it were more definite in fixing the character or size of gifts to be deemed to have been made in contemplation of death. Whether that is practicable or possible we do not suggest. The use of the word "material" does not make the law impossible of administration. Whether a gift constitutes a material part of a donor's estate is left a judicial question. As the legislature has not attempted to define with exactness what shall be considered a material part of an estate, neither shall we. That

question must be left to be determined in each case as it arises. In this case the estate was valued at about $330,000. We think that occasional gifts of $500 or $1,000 made by a donor possessing such an estate should not be deemed a material part thereof. None of the gifts made prior to the year 1917 exceeded $1,000. We hold that such gifts are not taxable. We hold that the gifts made in 1917, of $10,000 to each of the children on June 30th, $5,318.33 to each on August 18th, and $10,000 to each on October 1st, amounting to more than $75,000, do constitute a material part of the estate and that they are taxable.

By the Court.—Judgment reversed, and cause remanded with directions to reverse the judgment of the county court, with directions to disallow the deduction made for the amount of the federal estate tax and to include the amount of the gifts indicated in the opinion as a part of the taxable estate.

COUSINS, as Commissioner of Banking, Appellant, vs. SCHROEDER and others, Executors, imp., Respondents.

May 5—May 27, 1919.

Banks and banking: Commissioner of banking: Official reports and records: Secrecy: "Trial."

1. In view of sec. 2842, Stats. 1917, defining "trial," an examination of a plaintiff before answer, under sec. 4096, is not in substance and effect calling the party as a witness on a "trial in a court of justice" within the contemplation of sec. 2020, enjoining secrecy on the state commissioner of banking concerning official reports.
2. The words "or trial in a court of justice," in the clause "except when called as a witness in any criminal proceeding or trial in a court of justice," in said sec. 2020, Stats., refer to the preceding part of the clause specifying a criminal proceeding, and the word "trial" refers only to trials in criminal actions.
3. The duty imposed on the commissioner of banking by said sec. 2020 to keep secret all of the facts and information obtained in the course of an examination of a bank, is not terminated by the action of the commissioner in closing the doors of a bank and instituting liquidation proceedings.

APPEAL from an order of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

This action was brought by A. E. Kuolt, former commissioner of banking of the state, to recover of the defendants, as directors and personal representatives of directors of the now defunct Citizens Savings & Trust Company bank of Milwaukee (hereafter called the Trust Company), for alleged delinquencies in office as directors, resulting in loss and dissipation of the assets and capital of the banking corporation. Mr. Kuolt was succeeded by the present plaintiff, who continued the action against the defendants.

After service of the complaint and an amended complaint, but before answering, the defendants *Schroeder* and *Wellauer's Executors* examined plaintiff before James H. Stover, circuit court commissioner, at Milwaukee on March 28, 1919. Counsel for defendants, during this adverse examination, demanded that plaintiff produce certain official reports made by bank examiners concerning the condition of the Trust Company bank for a number of years prior to the closing of its doors. These reports were on file in the office of plaintiff in the state capitol.

Plaintiff refused, upon advice of counsel, to produce these official reports and documents, basing his refusal on sec. 2020, Stats., enjoining secrecy on the commissioner of banking concerning official reports.

The court commissioner thereupon ordered the production of these reports and documents, and, upon the continued refusal of plaintiff to produce them, adjudged him in contempt, and a warrant of commitment was thereupon signed by the court commissioner. The plaintiff secured from the circuit court an order to show cause why the order and warrant of the court commissioner should not be vacated. Upon the hearing the circuit court confirmed the order and commitment issued by the court commissioner. This is an appeal from such order.

For the appellant there was a brief by *Lawrence A. Olwell*

and *Bernard V. Brady,* both of Milwaukee, and oral argument by *Mr. Brady.*

For the respondents *Schroeder* and *Wellauer's Executors* there was a brief by *Frank M. Hoyt,* attorney, and *J. G. Hardgrove,* of counsel, both of Milwaukee, and oral argument by *Mr. Hoyt.*

SIEBECKER, J. The circuit court commissioner and the circuit court held that an examination of a party to an action "otherwise than as a witness on a trial" under sec. 4096, Stats., which "may be taken by deposition at the instance of the adverse party in any action or proceeding, at any time after commencement thereof and before judgment," is in substance and effect calling the party as a witness on a "trial in a court of justice" within the contemplation of the provisions of sec. 2020, Stats. This interpretation of sec. 4096 is contrary to the evident intent expressed by the words of the statute. The word "trial" used in this connection is clearly used in the sense it had acquired in the law when the statute was enacted. "Trial" in its legal meaning has been defined as "the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue for the purposes of determining such issue." 3 Bouv. Law Dict. 3320, and cases cited. This definition is in harmony with the definition of a trial as used and defined in the statutes of this state concerning courts, actions, and proceedings in actions. Sec. 2842 defines a trial as follows: "A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact." In *Carpenter v. Winn,* 221 U. S. 533, 31 Sup. Ct. 683, the court made an examination of the subject and declared that the word has acquired a broader significance than its original common-law meaning, and has come to mean "the final examination and decision of matter of law as well as fact, for which every antecedent step is a preparation." In this case the court had under consideration the question whether the

federal statute (sec. 724, R. S. U. S.) providing a substitute for a bill of discovery in aid of a legal action was a proceeding "in the trial of actions at law," and it was there held that the word "trial" as used in the act of Congress did not include the substituted proceeding for a bill of discovery. This decision involved the identical question raised in the instant case under sec. 4096. It is apparent that the circuit court erred in holding in this case that an examination of a party "otherwise than as a witness on a trial" under this section of the statutes was an examination of him as a witness "in a trial" in the sense the word "trial" is used in sec. 2020. Such an examination precedes the "trial" of the action and is, as the words of the statute plainly indicate, "otherwise than as a witness on a trial." In construing sec. 2020 the court held that in the clause "except when called as a witness in any criminal proceeding or trial in a court of justice," the words "or trial in a court of justice" did not refer to the preceding part of the clause specifying a criminal proceeding, but that the word "trial" was intended to include all trials in civil and criminal actions. We cannot approve this interpretation of this clause. The phraseology seems clear and plain and must be given its ordinary significance. The words "any criminal proceeding or trial" in the grammatical relation and natural meaning as employed here convey the idea that this exception to the secrecy enjoined by the preceding part of the statute refers to criminal proceedings and trials. We are persuaded it was the legislative intent to restrict this exception to proceedings and trials in criminal actions, and the circuit court erred in holding that the words "or trial in a court of justice" included all trials in criminal and civil actions.

It is further contended by respondents that the ruling of the circuit court is justified on the ground that the duty imposed on the bank commissioner and the deputy and every clerk in the department, "to keep secret all of the facts and information obtained in the course of such examination, except so far as the public duty of such officer requires him to

report upon or take special action regarding the affairs of any bank," has been terminated by the action of the commissioner in closing the doors of the Trust Company and instituting liquidation proceedings. The exception relied on in this claim only goes to the extent of releasing secrecy "so far as the public duty of such officer requires him to report upon, or take special action regarding, the affairs of the bank." Clearly under the first part of this exception his duties as commissioner do not require of him to remove the secrecy enjoined on him by disclosing the facts and information contained in the reports of the examination of banks made by the commissioner or any person under his direction. But it is insisted that the closing of the doors of the Trust Company and the institution of liquidation proceedings are steps of the kind contemplated by "taking special action regarding its affairs" and raises the bar to secrecy. This, however, disregards the limitation expressed by the words of the exception that secrecy is released only so far as to enable the commissioner to take the special action regarding the bank's affairs; which in no sense throws open the doors for others to obtain information of the facts and information contained in such reports as are filed in his office. Such action by the commissioner does not raise the bar to secrecy as to facts and circumstances contained in examiners' reports filed with the department.

It is strenuously urged that the protection of secrecy enjoined by sec. 2020, although vitally essential to a bank as a going concern, is wholly unnecessary and useless to an insolvent bank, the affairs of which have been for several years past in process of liquidation like those of the Trust Company. This claim is based upon the ground that the reasons for secrecy, under such circumstances, have ceased, in that the evils guarded against making public its financial and business affairs can no longer affect it in a harmful way. The object of the statute includes more than protecting the financial and business affairs of a bank that had been exam-

ined. It was enacted to keep secret all information and facts contained in any report of an examination of a bank as required by the statute. Such a report may, and probably does, contain a record of facts and much information concerning securities and business affairs confidentially obtained through various sources and from different persons and business concerns connected with and throwing light on the conduct of the business and affairs of the bank covered in the report. Obviously, disclosure of such facts and information might do serious injury to other persons and financial institutions than the bank undergoing liquidation. We are of the view that the statute was designed to enjoin secrecy of such facts and information in reports on file in the state banking department and that production of the reports pursuant to the order appealed from would be in violation of the secrecy enjoined by this statute.

It is considered that the circuit court commissioner and the circuit court erred in ordering the plaintiff to produce the reports in question upon his examination as a party otherwise than as a witness on the trial, and in adjudging him guilty of contempt for his refusal to produce and submit to respondents the reports specified in the question propounded to him upon such examination.

By the Court.—The order appealed from is reversed, and the cause remanded to the circuit court with direction that the court enter an order vacating the order of the court commissioner ordering appellant in contempt and to dismiss the warrant issued therein, and for further proceedings according to law.

ESCHWEILER, J., dissents.

GAILEY and another, Appellants, vs. BROWN, Respondent.

April 2—June 25, 1919.

Wills: Revocation by marriage: Foreign judgments: Conclusiveness: Courts: Jurisdiction.

1. Where under the statutes of another state a will is revoked by the subsequent marriage of the testator, a judgment or decree of a court of competent jurisdiction in that state that the will of a person domiciled therein had been so revoked is conclusive and binding upon the courts of this state, even though such will devised real property located in this state and under our statutes marriage alone does not operate to revoke a prior will.
2. Where in such a case, upon petition of a devisee, the person having possession of the alleged will was, while in this state, personally served with a citation to produce such will for probate in the county court of a county in this state wherein some of the real property devised was located, and he appeared in such court to show cause why he should not deliver the document, said county court had jurisdiction of his person and of the subject matter.

APPEAL from an order of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Affirmed.*

This is a proceeding to compel *Edward W. Brown* to produce, for the purpose of probate, a will of Byron S. Gailey, deceased.

Byron S. Gailey, a practicing physician of Jacksonville, Illinois, died November 8, 1916. At the time of his death he owned 320 acres of land in Portage county, and an interest in 200 acres of land in Waupaca county, in this state. On July 14, 1914, he had executed a will which was signed by him that day in the presence of *Edward W. Brown,* who retained possession of the document, and another as witnesses. This will devised and bequeathed his entire property, share and share alike, to his mother, Mary E. Gailey, his sister, *Rowena Gailey,* and three brothers, Dr. Darwin S. Gailey, Dr. Watson W. Gailey, and Eugene P. Gailey, and directed the executor to sell all real estate wherever located and em-

powered the executor to execute and deliver instruments of title.

On June 22, 1916, Byron S. Gailey married Bess Brown Smith, who survives him as his widow. On November 11th, three days after the death of her husband, Mrs. Gailey made petition to the county court of Morgan county, Illinois, for administration of his estate as an intestate estate. The petition was filed on the same day and an order was made appointing the respondent, *Edward W. Brown,* as administrator. A month later the brother, Eugene P. Gailey, learned of the will of Byron S. Gailey, and without knowing its contents the Gailey family decided to contest the administration of the estate of Byron S. Gailey as an intestate estate. On June 9, 1917, Eugene P. Gailey filed a petition in the county court of Morgan county, Illinois, praying for an attachment or citation to compel *Mr. Brown* to produce the will of Byron S. Gailey in the county court. In his answer *Mr. Brown* set forth the fact of the marriage of Byron S. Gailey on June 22, 1916, and that he, *Brown,* had no will in his possession executed after that time. He admitted that he had an instrument made and published by Byron S. Gailey on July 14, 1914, but sets forth the provision of the statute of the state of Illinois which provides that a subsequent marriage revokes a will. The will was not filed in response to the petition, and the petition was dismissed by the county court. The petitioner asked for an appeal to the circuit court of Morgan county, but no appeal was ever actually taken.

The respondent, *Edward W. Brown,* was in Waupaca county, Wisconsin, in July, 1917, and, there being real estate owned by the deceased in Portage county, Eugene P. Gailey made petition to the county court of Portage county for a citation to compel *Mr. Brown* to produce the will for probate in Portage county. While this proceeding was still pending in the county court of Portage county, Dr. Darwin S. Gailey, a brother of the deceased and of Eugene P. Gailey, peti-

tioned the county court to be made a party petitioner, and upon proceedings duly had he was made a party. Eugene P. Gailey died before the case was removed to circuit court. Darwin S. Gailey, having been made a party petitioner in the county court, took appeal to the circuit court. The circuit court affirmed the order and judgment of the county court of Portage county refusing to require *Edward W. Brown* to produce the will of Byron S. Gailey. The decision of the circuit court was made and filed October 11, 1918, and the final order was dated October 21, 1918, and entered on October 22, 1918; notice of this order, bearing the date October 24, 1918, being served on appellants' attorneys on October 25, 1918. Darwin S. Gailey, the petitioner, had died intestate on October 20, 1918, after the decision had been made but before the final order was entered.

Upon proceedings had thereafter an order was made by the circuit court on November 25, 1918, making the sister, *Rowena Gailey,* a party petitioner, and reviving the action as to Darwin S. Gailey by substituting his administrator, *U. J. Sinclair,* as a party petitioner.

This appeal from the circuit court is taken by *Rowena Gailey* and *U. J. Sinclair,* administrator of the estate of Darwin S. Gailey, deceased.

For the appellants there was a brief by *Fisher & Cashin* of Stevens Point and *Bellatti, Bellatti & Moriarty* of Jacksonville, Illinois, and oral argument by *W. E. Fisher* and *Paul Moriarty.*

For the respondent the cause was submitted on the brief of *Kreutzer, Bird, Okoneski & Puchner* of Wausau.

The following opinion was filed April 29, 1919:

SIEBECKER, J. This appeal presented the fundamental question whether or not Dr. Byron S. Gailey left a will devising his interest in real estate in Wisconsin. As appears from the foregoing statement, Dr. Gailey was a resident of Jacksonville, Morgan county, Illinois, at the time he executed

a will, July 14, 1914, and continued to reside there to the time of his death. It is without dispute that under the law of Illinois his marriage in June, 1916, operated to revoke this will in the state of Illinois, and that his estate was administered in the court of Illinois as an intestate estate. It also appears in this proceeding that the persons named as devisees in the doctor's alleged will caused proceedings to be commenced in June, 1917, in the county court of Morgan county, Illinois, to compel *Edward W. Brown* to produce this testamentary writing of Dr. Gailey and that such county court adjudged that it had been legally revoked under the law of Illinois by his marriage to Bess Brown Smith subsequent to its execution and that he died intestate. The county court of Portage county, Wisconsin, wherein this proceeding was commenced, held that it had no jurisdiction of the subject matter involved in this proceeding or of the respondent, *Edward W. Brown,* who was personally served in the proceeding, upon the grounds that the county court of Morgan county, Illinois, had in its citation proceedings adjudged that the decedent's marriage after execution of the alleged will revoked it, and that he died intestate, and that such adjudication must be given full faith and credit and is binding on the courts of this state. It therefore dismissed appellants' petition. On appeal to the circuit court for Portage county that court was of the opinion that the judgment of the Morgan county court was not *res adjudicata* as to these questions and that revocation of the will under the laws of Illinois did not operate to revoke the will under the laws of this state, but that the provisions of the alleged will showed that the testator intended that his real estate was to be sold by the executor and converted into money, and hence the testator's entire estate disposed of by this testamentary writing would have to be treated as personal property on the principle of equitable conversion, and therefore the law of testator's domicile controlled as to the revocation of his will and that it was revoked by his subsequent marriage.

In *Ford v. Ford,* 70 Wis. 19, 33 N. W. 188, this court declared the following to be the common-law rules applicable to wills deducible from the adjudications:

"1. The validity of every devise or disposition of real estate by will must be governed by the law of the place where the land is situated, and this includes not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such a disposition," citing.

"2. On the contrary, although not as well defined, nor as extensively enforced, yet the authorities clearly support the proposition that the validity of a bequest or disposition of personal property by last will and testament must be governed by the law of the testator's domicile at the time of his death, and this includes not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition," citing.

These propositions declaring the common law on the subjects do not determine the question whether or not the revocation of the doctor's will under the law of Illinois operated to revoke it under the statute law of Wisconsin. These statutes prescribe what persons may devise and bequeath real and personal property, how wills are to be executed and attested, when made either within or without the state. Sec. 2290, Stats., provides that a will or any part thereof may be revoked by the acts of the testator in the manner specified in this section, "excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator. The power to make a will implies the power to revoke the same." In *Glascott v. Bragg,* 111 Wis. 605, 87 N. W. 853, it was held that at common law marriage of the testator and birth of a child operated in Wisconsin to revoke a will made prior to such marriage and not in contemplation thereof. This interpretation of our statutes excludes the idea that marriage alone, as the Illinois statutes provide, shall be deemed a revocation of a prior will. Secs. 3789 and

3790 provide that an exemplified copy of a foreign will and a record of admitting it to probate in the place of the testator's domicile may be probated and filed in this state, and if upon hearing it shall appear that such a will was admitted to probate by a court of competent jurisdiction and is still in force, then such copy and probate thereof shall be filed and recorded *and shall have the same effect as if it had been originally proved and allowed in the courts of this state.* Sec. 2295, Stats., provides:

"When a will devising lands in this state, or any interest therein, shall have been duly proved and allowed in the proper court of any other of the United States or the territories thereof a copy of such will and of the probate thereof, duly authenticated, may be recorded in the office of the register of deeds of any county in which any such lands are situated, and when so recorded . . . shall be as valid and effectual to pass the title to such lands as if such will had been duly proved and allowed by the proper court in this state."

The effect of these statutes is to make the decrees of the courts of testator's domicile conclusive as to the existence and validity of a will and to give to such decrees the same effect as if rendered by the courts of this state. This result of the statutes was declared in *In re Gertsen's Will,* 127 Wis. 602, 106 N. W. 1096, where the testatrix, domiciled in Nebraska, where she died, left property in Nebraska and Wisconsin, and her will was probated by a competent court in Nebraska. In a proper proceeding and hearing to probate it in this state upon an exemplified copy of the will and record admitting it to probate in Nebraska, the circuit court of Wisconsin denied probate of such will upon the ground that no guardian *ad litem* had been appointed for the minors in the proceedings for probate of the will in the Nebraska court. This court said, on review of the circuit court's decision:

"The mistake was made, it seems, *by looking to the essentials of a valid original probate of a will in this state, instead of such essentials in Nebraska.* The language of the section is *not* to the effect that if it appears that the former pro-

bate was according to the laws of this state the will shall be admitted in the secondary proceeding with like effect as if they were primary: to the contrary it says: 'If on the hearing it shall appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction, . . . the will shall have the same force and effect as if it had been originally proved and allowed in the same court."

The effect of these statutes is to modify the rules of the common law on the subject and to make the decisions of the courts of the testator's domicile valid and binding in the courts of this state and to give to them the effect of legally establishing and probating wills devising real estate in Wisconsin. The necessary result of these statutes, therefore, is that the primary inquiry of determining as to the form and mode of the execution of foreign wills devising real estate in Wisconsin and the lawful power of the testator to make such a will is committed to the court of the testator's domicile.

The determination of these questions legally and necessarily includes the inquiries by such foreign courts whether or not testator made a valid will and, if so, whether it had been legally revoked before his death; and such judgment of the courts in sister states is to be accepted here as fixing the status of the instrument propounded as a will and under these statutes has the same effect as if the original proceeding had been had in the court of this state. It is considered that it results from this statutory modification of the common law that the question whether or not a purported will has been revoked is necessarily an inquiry in such foreign probate proceeding and is committed to the court of testator's domicile for determination under the law of his residence. It must therefore follow that the law of Illinois concerning the revocation of wills controls in the instant case. There is no dispute but that the marriage of Dr. Gailey after making the will in question revoked it under the laws of Illinois.

The record shows that this proceeding was commenced by personal service on the respondent, *Brown,* and that he ap-

peared to show cause why he should not deliver the writing alleged to be the valid will of Dr. Gailey. This conferred jurisdiction of the subject matter and of the respondent. This is sufficient to enable the courts to inquire into the merits of the petitioner's claims. Since the facts show that petitioner is not entitled to the relief demanded and that the petition must be dismissed, it is unnecessary to consider whether or not granting the relief prayed for would be a fruitless adjudication in the matter under the facts and circumstances presented by the record.

By the Court.—The order appealed from is affirmed.

A motion for a rehearing was denied, with $25 costs, on June 25, 1919.

GUARDIANSHIP OF FARR: FARR, Appellant, vs. SABY, Respondent.

April 2—June 25, 1919.

Insanity: Incompetency: Evidence: Guardianship: How affected by adjudication in another county: Allowances.

1. A man may be sane in the sense that it is not necessary to incarcerate him in an asylum, and yet be incompetent to manage his estate, even though he be not a spendthrift or a drunkard.
2. An adjudication that a person is sane at a given time is not conclusive, but has a probative effect only, upon the question whether he was sane twenty-three months thereafter.
3. Where in the county court of the county in which a person resided a guardian of his person and estate was appointed on the ground that he was incompetent, a subsequent adjudication that he is sane, made in another county, does not directly affect the status of or terminate such guardianship.
4. In determining the question whether a person is competent to manage his estate, the status of the estate at the time may properly be taken into account.
5. Allowances made in this case to the guardian of an incompetent and to his attorney, the services of both of whom were much increased by the ward's conduct and litigation, are *held* reasonable.

APPEAL from a judgment of the circuit court for Buffalo county: E. B. BELDEN, Judge. *Affirmed.*

Proceedings begun by petition in the county court of Buffalo county January 30, 1917, for an accounting by defendant of his guardianship of the person and estate of plaintiff and for a removal of defendant as guardian and the appointment of another. The defendant filed an account, and upon a hearing the county court approved it and denied plaintiff's application for removing the guardian. Plaintiff appealed to the circuit court and there asked for an accounting and a termination of the guardianship. In August, 1918, that court entered a judgment approving the guardian's account and refusing to terminate the guardianship, from which judgment plaintiff appealed to this court.

It appears that on March 4, 1916, plaintiff, theretofore a resident of Buffalo county, was duly committed to the state hospital for the insane at Mendota, where he was confined till June 22, 1916, when he was released on parole. On April 11, 1916, the defendant, upon due proceedings had in the county court of Buffalo county, was appointed guardian of the person and estate of plaintiff and has since continued to act as such. He has filed a petition showing that numerous claims exist against the estate; and an order limiting the time within which claims could be filed was made, a hearing has been had on numerous claims, and more than $10,000 in amount have been allowed. In addition, mortgages amounting to about $13,000 are outstanding against the real estate, which has been inventoried at $29,000. The personalty has been inventoried at $2,099.40, and the circuit court found that if plaintiff was allowed his homestead exemption it is doubtful if creditors can be paid in full.

When plaintiff was paroled from the asylum at Mendota he went to La Crosse county to live, and on July 11, 1916, he filed in the county court of that county a petition stating he was out on parole from the asylum, that defendant was his guardian, and asking for a judicial examination as to his

then mental condition. Notice of such hearing was served upon defendant, but he did not appear. A hearing was had, and on July 18, 1916, plaintiff was adjudged sane and restored to his civil rights as fully as he possessed them before he was adjudged insane.

C. M. Hilliard of Durand, attorney, and *F. E. Withrow* of La Crosse, of counsel, for the appellant.

Theodore Buehler of Alma and *S. G. Gilman* of Mondovi, for the respondent.

The following opinion was filed April 29, 1919:

VINJE, J. The plaintiff contends that he gained a residence in La Crosse county after he was paroled from the asylum, and that under the provisions of sec. 587, Stats. 1915, the county court of that county had jurisdiction to determine his sanity. He further contends that the adjudication of the county court of La Crosse county that he was sane on July 18, 1916, when its judgment was entered, is conclusive proof and *res judicata* of the issues in this case as to his competency to manage his estate. The defendant denies the correctness of these contentions. In our view of the matter we do not find it necessary to decide the legal issue raised by the first contention, because, assuming the validity of the judgment of the county court of La Crosse county establishing plaintiff's sanity on the 18th day of July, 1916, it by no means follows that he was competent to manage his estate in June, 1918, when the circuit judge made his findings. This is so for two reasons: First, because "sanity" and "competency to manage an estate" are not synonymous terms. A man may be sane in the sense that it is not necessary to incarcerate him in an asylum and yet be incompetent to manage an estate, even though he be not a spendthrift or a drunkard. And second, because a condition of sanity or competency to manage an estate is not a permanent, unchangeable condition. A man may be sane or competent at one time, and be insane or incompetent at a future time. Our

statute, sec. 587*c*, upon which plaintiff relies for a presumption of sanity after two years from a parole, recognizes this fact, for it provides that "Upon the expiration of two years from the time of granting such parole, . . . the presumption of insanity against such person . . . shall cease, and until *a new adjudication to the contrary,* he shall be presumed sane." This statute merely restores the presumption of sanity, which can be overcome by proof to the contrary just as in the first adjudication of insanity. In the absence of any adjudication to the contrary every person is presumed to be sane, and such presumption must be overcome by proof before an adjudication of insanity can lawfully be entered. That the statutory presumption is not conclusive is evidenced by the fact that it obtains only till a new adjudication to the contrary is made. And the statute recognizes the fact that a new adjudication can be made at any time.

When, therefore, plaintiff in June, 1918, asked the court to pass upon his then competency to manage his estate, the fact that he was sane twenty-three months prior thereto had but a probative effect upon the question at issue. It did not by any means determine it conclusively. So, too, the adjudication by any other competent court as to plaintiff's sanity could not directly affect the status of or terminate the guardianship matter in the county court of Buffalo county. That court in the first instance was the only one having jurisdiction of that matter, and this fact the plaintiff recognized when he filed his petition therein to be restored to the right to manage his estate.

The circuit court found that plaintiff was incompetent to manage his estate, and this finding is assailed as being contrary to the evidence. Plaintiff was a witness in the case and the trial court had an opportunity to observe and judge his mental capacity. Our opportunity to do so is much more limited, being confined to the printed page. In coming to the conclusion that plaintiff was incompetent the trial court properly took into account the status of the estate at that

time. It was in process of settlement. Many claims had been allowed, but none were paid. Mortgages to the amount of $13,000 were outstanding. It was the opinion of the trial court, and it so found, that it was for the best interest of the estate as well as the creditors that the guardian continue the administration of the estate. The condition of the estate is referred to because it shows that it required considerable mental capacity to intelligently and efficiently manage such estate. The court found that plaintiff lacked such capacity, and from the evidence we cannot say the court erred in so finding.

The court also found that the guardian had managed the estate "fairly and reasonably and without fraud, collusion, dishonesty, or waste." This finding must also be held to be sustained by the evidence. It would be profitless to the parties herein and to the legal profession to enter into a detailed discussion relating to plaintiff's alleged shortcomings of the guardian's management, and the evidence to the contrary.

The sum of $500 allowed the guardian in full for his services and the sum of $890 allowed his attorney must be deemed to be reasonable. The services of both guardian and attorney were much increased by the ward's conduct and litigation. By this statement no criticism is intended to be made of such conduct—only its result is reverted to for the purpose of showing a basis for the allowance.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, without costs, on June 25, 1919.

GEORGIA CASUALTY COMPANY, Respondent, vs. AMERICAN MILLING COMPANY, Appellant.

April 4—June 25, 1919.

Master and servant: Negligence: Fellow-servants: Servants of separate masters: Evidence: Doctrine of res ipsa loquitur: Admiralty: Jurisdiction: Saving of common-law remedy: Workmen's compensation laws: Maritime injuries: Jurisdiction of state courts: Injuries to stevedore: Damages.

1. Where a servant was injured through the negligence of a servant of another master, the negligence cannot be said to be that of a fellow-servant, although both masters were engaged in the same enterprise, namely, the unloading of a vessel, there being no identity of control.
2. Where both an apparatus and its operation are in the control of defendant, and an accident happens which could not ordinarily happen except by reason of defective apparatus or negligent operation by defendant's servants, the fact of the accident might be sufficient of itself to justify a finding of defect in the apparatus or negligence in its operation.
3. Under sec. 9 of the federal Judiciary Act of 1789 and sub. 3, sec. 24, and sec. 256 of the Judicial Code, admiralty jurisdiction is vested exclusively in the United States district courts, saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.
4. The work of a stevedore in loading or unloading a ship lying at a wharf is maritime service, and actionable injuries received during such work are so far maritime injuries that recovery may be had for them in the admiralty courts by libel *in personam* against the stevedore company which employs him.
5. Workmen's compensation laws provide remedies wholly unknown to the common law, which are incapable of enforcement by the ordinary process of any court, and are not saved to suitors by the saving clause in sec. 9 of the Judiciary Act of 1789, relating to admiralty jurisdiction.
6. The common-law jurisdiction of the state courts over torts committed at sea is preserved by such saving clause, but remedies by proceedings *in rem* can only be administered in the admiralty courts.
7. Where a stevedore is injured while unloading a vessel at a wharf and does not seek a remedy against the vessel itself, he may recover full damages in a common-law action in a state court, and *it seems* may recover the same in an action in a maritime court.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This is an action brought by the plaintiff as assignee of one Elmer Emerson for personal injuries suffered by said Emerson as the result of the alleged negligence of the defendant company July 30, 1916. The facts are not materially in dispute. Emerson was a stevedore in the employ of the Duffy Stevedore Company, a copartnership, and was seriously injured during the unloading of the steamer La Salle while that steamer was lying at the dock adjoining the defendant's elevator in the harbor at Superior.

The cargo was a cargo of screenings owned by Minneapolis parties, and it was being elevated into the elevator building for storage. The method was this: An adjustable spout, called a marine leg, was let down from the side of the elevator into the hold of the boat, in which operated an endless belt equipped with buckets which carried the grain up the leg into the elevator. For a time the buckets needed no assistance from stevedores, the grain running by gravity into the buckets, but as the work went on and the grain was taken out so that it slanted away from the end of the marine leg at an angle of about forty-five degrees, assistance by stevedores became necessary, first by hand shovels, and later, as the grain retreated further, by so-called power shovels or scrapers which hauled the grain to the foot of the marine leg. The power shovel was operated by a steel cable attached to it and running to a drum on a shaft revolving rapidly and constantly on the outside of the elevator about eighteen feet above the dock, which shaft was impelled by an electric motor inside the elevator. The drum revolved only when a clutch was engaged by friction with the drum, and the clutch operated only when a rope attached to a lever was pulled by an employee of the defendant standing on the deck of the boat, who pulled it when it was desired to draw the shovel or scraper full of grain towards the foot of the leg. It is undisputed that in order to keep the clutch in opera-

tion the operator must continue to pull on his rope, otherwise the clutch at once becomes disengaged and the drum ceases to operate. The work of the stevedores, when the power shovel was in use, was to take hold of the handles of the shovel, pull it back from the leg as the steel rope unwound from the drum, let it fill with grain, and then, as the rope was pulled and the clutch engaged, follow the shovel to the foot of the leg, dump it, and repeat the operation. The employee of the defendant operating the rope to the clutch could see the stevedores much of the time through the open hatch and knew when they were ready to have the rope pulled, and under such circumstances would pull it without signal. When, however, the men took the shovel so far from the hatch as to be out of sight, they would give a signal by hollering "All right" to the rope man. At the time of the accident Emerson and another stevedore had just got up to the leg with a full shovel and dumped it and had taken hold of the handles and turned around, dragging the shovel back, walking on the screenings. They had gone two or three steps when the clutch engaged, the shovel was jerked out of the hands of the stevedores and Emerson fell, and his foot was caught by the buckets on the endless belt in the leg, causing serious injuries. The owners of the grain had made separate contracts with the defendant company and with the stevedore company. The defendant company contracted to store the grain, furnish the marine leg, shovel, and power to operate them, also the rope tender, and the stevedore company contracted to take charge of the appliances in the hold of the vessel and furnish the necessary men to operate them and get the grain to the foot of the marine leg.

Both the stevedore company and Emerson had elected to come under the provisions of the Wisconsin workmen's compensation act, and Emerson filed a claim for his injury under the act, which was allowed and paid in due course, whereupon Emerson assigned his cause of action against the defendant to his employer, the stevedore company, which in

turn assigned it to the plaintiff company, which had insured the risk and paid the award.

The jury returned a special verdict finding (1) that there was no want of ordinary care with regard to the condition of the machinery; (2) that there was want of ordinary care in the operation of the machinery which pulled the shovel, (3) which want of ordinary care was the proximate cause of Emerson's injury; and (4) that the damages suffered by Emerson were $1,102.10. From judgment for the plaintiff on this verdict the defendant appeals.

For the appellant there were briefs by *W. M. Steele* of Superior, attorney, and *H. E. Kelly* and *Butler, Lamb, Foster & Pope* of Chicago, of counsel, and oral argument by *Mr. Steele.*

For the respondent there was a brief by *Luse, Powell & Luse* of Superior, and oral argument by *C. Z. Luse.*

The following opinion was filed April 29, 1919:

WINSLOW, C. J. The defendant's chief contention in the case is that the trial court had no jurisdiction for the reason that the cause of action is maritime in its nature and within the sole jurisdiction of the admiralty courts of the United States. Two lesser contentions are made, however, which will be first briefly considered.

It is said that the rope tender and Emerson were, as matter of law, fellow-servants, and hence that there can be no recovery because the negligence found (*i. e.* the pulling of the rope by the rope tender at the wrong time) was the negligence of a fellow-servant. The contention must fail. Emerson and the rope tender were employed and paid by different masters. True, both masters were engaged in the same enterprise, namely, the unloading of the vessel, but this is not sufficient: there must be identity of control; here, the servants of neither master were under control of the other, and this is the ultimate test. 26 Cyc. 1284; 18 Ruling Case Law, p. 762, § 226; *Phillips v. C., M. & St. P. R. Co.*

64 Wis. 475, 25 N. W. 544; *Hoveland v. Nat. B. Works,* 134 Wis. 342, 114 N. W. 795; *Johnson v. E. C. Clark M. Co.* 173 Mich. 277, 139 N. W. 30; *Wagner v. Boston E. R. Co.* 188 Mass. 437, 74 N. E. 919; *Standard Oil Co. v. Anderson,* 212 U. S. 215, 29 Sup. Ct. 252.

In his charge to the jury the trial judge applied the doctrine of *res ipsa loquitur* and told the jury in substance that where both the apparatus and its operation are in the control of the defendant and an accident happens which could not ordinarily happen except by reason of defective apparatus or negligent operation, the fact of the accident might be sufficient of itself to justify a finding of defect in the apparatus or negligence in its operation. We see no error here. It is undisputed that the defendant had control of the apparatus and its operation, and it is also undisputed that the apparatus worked abnormally and operated when it should not operate, thereby causing Emerson's injury. Nothing more is needed to make the rule applicable to the case. *Cummings v. Nat. F. Co.* 60 Wis. 602, 18 N. W. 742, 20 N. W. 665; *Klitzke v. Webb,* 120 Wis. 254, 97 N. W. 901. Under the undisputed evidence we are unable to see how the jury could reach any other conclusion except that the rope tender negligently pulled the rope when it should not have been pulled.

We pass now to the question of jurisdiction. No attempt will be here made to review the decisions of the federal courts on the general subject of the jurisdiction of the district courts of the United States over torts occurring on shipboard. The harmony between them is certainly not complete and no good purpose would be subserved by lengthy discussion. A learned and very complete note collecting the authorities is to be found appended to the case of *Cleveland T. & V. R. Co. v. Cleveland S. Co.* (208 U. S. 316, 28 Sup. Ct. 414) 13 Am. & Eng. Ann. Cas. 1215.

The principles which govern the present case are not numerous nor do we think they are seriously in doubt.

Admiralty jurisdiction is vested exclusively in the United

States district courts, "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." Judiciary Act of 1789, sec. 9; U. S. Judicial Code, sec. 24, sub. 3, and sec. 256.

The work of a stevedore in loading or unloading a ship lying at the wharf is maritime service and actionable injuries received during such work are so far maritime injuries that recovery may be had for them in the admiralty courts by libel *in personam* against the stevedore company which employs him. *Atlantic T. Co. v. Imbrovek,* 234 U. S. 52, 34 Sup. Ct. 743.

Workmen's compensation laws provide remedies wholly unknown to the common law, which are incapable of enforcement by the ordinary processes of any court and are not saved to suitors by the saving clause of the judiciary act above cited. *Southern Pac. Co. v. Jensen,* 244 U. S. 205, 37 Sup. Ct. 524.

The common-law jurisdiction of the state courts over torts committed at sea is preserved by the clause cited, but remedies by proceedings *in rem* can only be administered in the admiralty courts. *Steamboat Co. v. Chase,* 16 Wall. 522; *Sherlock v. Alling,* 3 Otto (93 U. S.) 99; *The Hamilton,* 207 U. S. 398, 404, 28 Sup. Ct. 83; *McDonald v. Mallory,* 77 N. Y. 546; *Thompson v. Hermann,* 47 Wis. 602, 3 N. W. 579.

If no remedy is sought against the vessel itself, the case is not within the exclusive jurisdiction of the federal courts, but the state courts, administering common-law remedies, have concurrent jurisdiction. 1 Cyc. p. 811, sub. 2; 1 Corp. Jur. p. 1253, § 24. Full consequential damages may be recovered in such an action according to the statute or common law of the state which has jurisdiction. *Steamboat Co. v. Chase, supra; Standard Oil Co. v. Anderson,* 212 U. S. 215, 29 Sup. Ct. 252. The case last cited is closely analogous in its facts to the case before us and seems well nigh conclusive on the questions involved. Even though the action be

brought in the maritime court, it seems that full damages may be recovered in such a case as the one before us. *Imbrovek v. Hamburg-Am. S. P. Co.* 190 Fed. 229. In case of injury to a seaman on the high seas the measure of recovery is limited to wages, maintenance, and cure *(Chelentis v. Luckenbach S. Co.* 245 U. S. 655, 38 Sup. Ct. 501); but this is an ancient rule of maritime law applying only to seamen on a voyage. *The Osceola,* 189 U. S. 158, 23 Sup. Ct. 483.

We find no prejudicial errors in the record.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on June 25, 1919.

SWEET, Respondent, vs. MODERN WOODMEN OF AMERICA, Appellant.

April 4—June 25, 1919.

Insurance: Fraternal benefit insurance: Amendment of by-laws: Effect: Unexplained absence of beneficiary: New trial: Newly discovered evidence: Diligence: Sufficiency of affidavits: Appeal: Discretion of trial court.

1. A controversy as to contract rights between a fraternal benefit association and a beneficiary is not an internal affair of the corporation with reference to which the decisions of its tribunals can be made conclusive.
2. Thus, a by-law of a fraternal benefit association providing that the disappearance of a member for any period short of his life expectancy should not entitle the beneficiary to recover on the certificate, substantially changed the contract, and could not apply to a certificate theretofore issued, though the insured had agreed that laws thereafter enacted by the association should become a part of the contract.
3. The granting or refusing of a new trial for newly discovered evidence is within the discretion of the trial judge, and can be reversed on appeal only when there is a clear case of mistake.

4. Affidavits in support of a motion for a new trial in an action to recover insurance on the life of one who had disappeared several years before, which show that a person of the same name, coming from the same place, was then living in another country, and that the insured had been seen within two years of the commencement of the action, require the granting of a new trial on the ground of newly discovered evidence.
5. Where the wife of the insured had not heard from him for more than eight years and did not know his whereabouts, she cannot defeat the insurer's right to a new trial for newly discovered evidence that the insured was alive, on the ground of the insurer's lack of diligence in locating the insured before the trial.

APPEALS from a judgment of the superior court of Ashland county (CHARLES SMITH, Judge) and from an order of that court (SOLON L. PERRIN, Judge). *Reversed.*

This is an action brought to recover on a benefit certificate. Byron C. Sweet became a member of the *Modern Woodmen of America* at Superior, Wisconsin, November 12, 1898. A benefit certificate for $2,000, payable to his wife upon his death, was issued to him. Sweet left home about the 1st of April, 1909. His wife heard from him until about Thanksgiving, 1909, since which time she has heard nothing of or from him. This action was commenced in February, 1917, to recover the amount of the benefit certificate. The answer set up as a defense a by-law enacted by the society and in full force from and after September 1, 1908, as follows:

"Sec. 66. *Disappearance no presumption of death.* No lapse of time or absence or disappearance on the part of any member, heretofore or hereafter admitted into the society, without proof of the actual death of such member, while in good standing in the society, shall entitle his beneficiary to recover the amount of his benefit certificate, except as hereinafter provided. The disappearance or long-continued absence of any member unheard of, shall not be regarded as evidence of death or give any right to recover on any benefit certificate heretofore or hereafter issued by the society until the full term of the member's expectancy of life, according to

the National Fraternal Congress Table of Mortality, has expired within the life of the benefit certificate in question, and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the benefit certificate,' as here used, means that the benefit certificate has not lapsed or been forfeited, and that all payments required by the by-laws of the society have been made."

The case was tried before a jury. At the conclusion of the trial both plaintiff and defendant moved for a directed verdict, whereupon the court granted plaintiff's motion and judgment was entered in her favor. The defendant appealed from the judgment. After the record was received and filed in this court, upon motion of the defendant the record was remanded to the trial court to enable the defendant to move in that court for a new trial on newly discovered evidence. Such motion was made in the trial court. The motion was supported by various affidavits; one purporting to be by Byron C. Sweet himself, in which he states that he is living in Port Arthur, Ontario, Canada; one by the chief of police of Port Arthur, Ontario, Canada, who states that he is well acquainted with Byron C. Sweet, who now lives in Port Arthur, but who was formerly a resident of Superior, Wisconsin. There are affidavits of at least two others to the same effect, although they did not know said Sweet when he lived in Superior. There also were filed affidavits by several persons who knew Sweet when he lived in Superior, and who at various times, down as late as 1915, saw him in, or in the vicinity of, Port Arthur. Certain photographs of the person known as Byron C. Sweet at Port Arthur, Canada, were filed with the affidavits. In opposition to the motion, affidavits of persons who knew Sweet during the time he lived at Superior, including the plaintiff, stating that the photographs filed were not the photographs of the Byron C. Sweet who was plaintiff's husband, were filed. Upon this presentation the trial court denied defend-

ant's motion for a new trial, and the defendant appealed from that order. Both appeals were argued and will be considered together.

For the appellant there were briefs by *Truman Plantz* of Rock Island, Illinois, and *John B. Chase* of Oconto, and oral argument by *Mr. Chase.*

For the respondent there were briefs by *Grace, Hudnall & Fridley* of Superior, and oral argument by *C. R. Fridley.*

The following opinion was filed April 29, 1919:

OWEN, J. The plaintiff's case rested upon the presumption of death arising from the absence of her husband without any word or tidings from him or any intelligence concerning his whereabouts for a period of more than seven years. It is not disputed that this fact was substantially and satisfactorily proved. The defense relied solely upon the by-law set forth in the statement of facts which was adopted by the association subsequent to the issuance of the benefit certificate upon which the action is founded and in force from and after September 1, 1909, providing in effect that no lapse of time or absence or disappearance on the part of any member without proof of the actual death of such member shall entitle his beneficiary to recover the amount of his benefit certificate until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired. If that by-law is a legal enactment or regulation of the society, so far as it attempts to affect benefit certificates theretofore issued, then plaintiff cannot recover, otherwise there is no defense to the action and the trial court was right in awarding plaintiff judgment. It is well settled that in the administration of the internal affairs of a corporation the decisions of the tribunals of the association, within their own proper sphere, if not violative of law, may be made conclusive as to the members of the corporation. *Loeffler v. Modern Woodmen,* 100 Wis. 79, 75 N. W. 1012; *Bartlett v. L. Bartlett & Son Co.* 116 Wis.

450, 93 N. W. 473; *Callahan v. Order of Railway Conductors, ante,* p. 43, 171 N. W. 653. But a controversy as to contract rights between the association and a beneficiary under a benefit certificate cannot be considered as one of the internal affairs of the corporation. *Zaremba v. International H. Corp.* 162 Wis. 231, 155 N. W. 114. The by-law relied upon as a defense substantially modifies the contract embodied in the benefit certificate. By the terms of the certificate the defendant obligated itself to pay plaintiff $2,000 upon the death of Byron C. Sweet. His death was proved by legal evidence. The effect of the by-law was to make it impossible to recover on the certificate except by virtue of positive proof of death and in cases such as this to postpone recovery for a number of years, during which time the premium payments were required to be made in order to keep the benefit certificate alive. If the association could thus modify the contract no reason is perceived why it could not entirely nullify it. While Sweet in his application for membership agreed that "the laws of this society now in force, or hereafter enacted, enter into and become a part of every contract of indemnity by and between the members and the society, and govern all rights thereunder," such agreement should not be construed as giving defendant the right, after the issuance of the certificate, to so legislate as to unreasonably affect existing rights or modify obligations already entered into. It is the general holding of courts that by-laws enacted pursuant to such reserve power on the part of the society must be reasonable, and they will not be upheld in so far as they seek to unreasonably modify existing contracts between the society and its members. This very by-law was before the supreme court of Iowa in *Olson v. Modern Woodmen,* 164 N. W. 346, where in an elaborate opinion, well fortified by logic and authority, it was held that it could not affect existing contracts. We agree with the conclusion. The trial court correctly directed the verdict in favor of the plaintiff.

We come now to the question of whether the trial court erred in overruling defendant's motion for a new trial upon the ground of newly discovered evidence. We approach the consideration of this question with full appreciation of the rule obtaining in this court that

"The granting or refusing of a new trial on the ground of newly discovered evidence is to some extent a matter of discretion on the part of the trial judge, and, when in his discretion he denies the motion, it must be a clear case of mistake in the exercise of such discretion which will justify this court in reversing his order." *Grace v. McArthur*, 76 Wis. 641 (45 N. W. 518), at pp. 650 and 651, and cases there cited.

It should be noticed that the newly discovered evidence is not merely cumulative nor is it confined to a collateral issue which might affect the ultimate result either way. It goes directly to the ultimate fact involved, namely, whether Byron C. Sweet is alive or dead. The showing made on the motion for a rehearing is quite convincing that there is a man in Port Arthur, Ontario, Canada, who bears the name of Byron C. Sweet and that it is the understanding on the part of the chief of police of that city as well as some others that this same man formerly resided in the city of Superior. It also appears that a number of persons who knew Byron C. Sweet during the time he lived in Superior have seen him in the vicinity of Port Arthur, Canada, at various times subsequent to the time when his wife ceased to hear from him, some of whom will testify that he was alive as late as 1915. With such a showing it would, in our opinion, be unconscionable to permit this judgment to stand, resting as it does on a mere presumption of law that Sweet is dead because of a seven years' absence, during which time his family has not heard from him. Every consideration of justice plainly requires that the defendant have an opportunity to submit the evidence that it now has upon the question of Sweet's death upon another trial.

It is claimed on the part of the plaintiff that the motion for

a new trial is not accompanied by a showing of proper diligence on the part of the defendant. In this connection it must be remembered that the plaintiff herself, who is the person most likely to know of the whereabouts of her husband, testified that she had not heard from him since about Thanksgiving, 1909, and that she was wholly uninformed as to his whereabouts. When those who are most likely to hear from the absent one are unable to give any information as to his whereabouts, and assert, impliedly at least, their belief that he is dead, it is not reasonable to charge the defendant society with the burden of further investigation, under penalty of denying it the opportunity of showing the facts when it is subsequently discovered that the one claimed to be dead is in fact alive. Plaintiff's contention in this respect cannot be sustained.

A question of practice argued in the briefs should be noticed. Upon the hearing of the motion for a new trial the trial court permitted the introduction of oral testimony on the part of the plaintiff over the objection of the defendant. Defendant assails this practice. Plaintiff contends that the reception of oral testimony upon the hearing of a motion of this character is within the discretion of the trial court, and further asserts that this court cannot review the action of the trial court because the oral testimony introduced has not been certified in a bill of exceptions. As above stated, these arguments are made in the briefs. The question thus discussed was laid out of the case when the parties upon the oral argument stipulated that this court might consider what purports to be such evidence appearing in the record. A desire was expressed, however, by counsel at the time of entering into the stipulation that this court decide the question thus argued. We have examined the same sufficiently to convince us that there is much doubt concerning the practice of permitting oral testimony to be given upon the hearing of a motion of this kind, and, in view of the fact that the question is no longer material in this case by reason of the stipu-

lation above referred to, we refrain at this time from expressing any opinion with reference thereto.

By the Court.—The judgment and order appealed from are reversed, and the cause remanded with directions to grant a new trial on the ground of newly discovered evidence. No costs to be taxed. Appellant to pay the clerk's fees.

A motion for a rehearing was denied, with $25 costs, on June 25, 1919.

DIETRICH and another, Executors, Appellants, vs. ESTATE OF LONEY and another, Executrix, Respondents.

April 5—June 25, 1919.

Executors and administrators: Claim against estate: Stockholder's liability.

Where, after creditors have recovered judgment in an action instituted by them under sec. 3223, Stats., to enforce the liability of stockholders of an insolvent bank under sec. 2024—44, one of them files a claim for judgment recovered by him in such suit against the estate of a deceased stockholder liable under the judgment, his claim against the estate is for the benefit of all the creditors, and they have a right to share in the amount he recovers in proportion to their rights as fixed by the judgment rendered in the creditors' action.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

The appeal is from a judgment of the circuit court affirming a judgment of the county court reducing the amount of plaintiff's claim.

In 1895 the Douglas County Bank, a Wisconsin banking corporation at Superior, made an assignment for the benefit of its creditors. It was then indebted over $135,000 and with assets not to exceed $20,000. One H. P. Booth was a creditor and filed his claim, amounting to $713.86, therein, but received no dividend. In August, 1895, said Booth com-

menced an action in the superior court of Douglas county under sec. 3223, Stats., on behalf of himself and other creditors of the bank against the stockholders of said bank to enforce their liability under the provisions of what is now sec. 2024—44, and which at that time, under sec. 47, ch. 479, Laws 1852, read as follows:

"The stockholders in every corporation or association organized under the provisions of this act [regulating banking], shall be individually responsible to the amount of their respective share or shares of stock, for all its indebtedness and liabilities of every kind."

The city of Superior and other creditors intervened and were made plaintiffs.

On January 27, 1900, judgment was duly entered in such action fixing the amount due the respective plaintiffs as follows:

H. P. Booth	$1,040 07
City of Superior	26,780 30
Haven & Haven	479 90
Nettie Swenson	405 26
	$28,705 53

It further fixed the liability of the several stockholders made parties defendant at the amount of their respective stock holdings in a sum aggregating $29,500, exclusive of costs. In March, 1901, execution was issued against all of the defendants, and on April 15, 1901, returned unsatisfied.

In October, 1909, there was paid to said Booth the sum of $1,172.95 out of the sum of $1,630 which was realized on said judgment from the estate of one of the defendants, R. B. Dear, such sum being divided between Booth and one of the other intervening plaintiffs. After the application of said sum and computing interest on the balance the amount due said Booth on October 25, 1917, amounted to $606.64. No other payments than those specified were made to any of the plaintiffs in said action.

Prior to October 25, 1917, B. S. Loney, one of the defendants in said action whose liability had been adjudged at the time of the entry thereof at the sum of $1,000, died, and his estate was probated in Douglas county.

Upon notice given to the executrix of the will of said deceased, Loney, said Booth applied to the superior court of Douglas county for leave to file his claim for $606.64 against the said estate. No appearance was made in response to said application on behalf of the Loney estate and leave was thereupon granted by said superior court to so file the claim, which was thereupon done by Booth. The time for filing claims in the Loney estate expired and none of the other judgment creditors in the action in the superior court filed claims therein. The trial court found that the liability of the estate of Loney under the terms of the judgment aforesaid amounted, at the time of the adjustment of the Booth claim therein, to the sum of $2,120, and that Booth was entitled to but a *pro rata* share in said amount of liability in the proportion that his claim bore to the aggregate amount of claims fixed by the judgment in the superior court, and that such proportionate share would be but the sum of $76.83, and disallowed the balance, and also held that the estate of Loney was entitled to costs against the claimant. Subsequent to the filing of his claim Booth died and the proceedings were revived by his executors, who appear as plaintiffs and appellants herein. From the judgment so entered plaintiffs have appealed.

For the appellants the cause was submitted on the brief of *Dietrich & Dietrich* of Superior.

For the respondents there was a brief by *Luse, Powell & Luse* of Superior, and oral argument by *L. K. Luse* and *C. Z. Luse.*

The following opinion was filed April 29, 1919:

ESCHWEILER, J. The respective rights and obligations of the parties in the creditors' action in the superior court were

fixed and determined by the judgment therein entered in 1900 and such respective rights and obligations continued thereafter.

The nature of the form of action that was brought by Booth under sec. 3223, Stats., in the superior court of Douglas county has been so often declared by this court that nothing further need now be said as to the respective obligations of the parties thereto. *Coleman v. White,* 14 Wis. 700; *Booth v. Dear,* 96 Wis. 516, 71 N. W. 816; *Rehbein v. Rahr,* 109 Wis. 136, 85 N. W. 315; *Eau Claire Nat. Bank v. Benson,* 106 Wis. 624, 82 N. W. 604.

The estate of B. S. Loney was liable, pursuant to the terms of the judgment aforesaid, to an amount in excess of the claim filed by Booth. Under the nature of the relationship fixed by the judgment under the law, the filing of the claim by Booth to the amount of $606.64 was the filing of a just claim to the full amount thereof as against the Loney estate for the benefit, not of himself alone, but for all concerned; the distribution of such amount, when allowed, being for the superior court, where the respective rights of the judgment creditors could be properly determined, and was not within the power of the county court. The claimant, Booth, could get no better or higher right to the enforcement of his claim in the estate of Loney, so far as he was individually concerned, than would be permitted under the effect of the judgment in the superior court, and on the other hand the Loney estate could not be heard to defeat a just claim to the amount of $606.64 due from that estate to the plaintiff creditors in the superior court action, merely because it had been filed under the name of but one such creditor, when under the law his recovery must be for the benefit of the others.

The proper disposition of this situation requires that the full amount of the claim as filed by Booth should be allowed as against the estate of B. S. Loney, with costs, and when so allowed paid to the clerk of the superior court of Douglas

county, there to be held subject to proper disposition and distribution by the superior court.

By the Court.—The judgment of the circuit court is reversed, and the action remanded for further proceedings in accordance with this opinion.

A motion for a rehearing was denied, with $25 costs, on June 25, 1919.

McALLISTER, Respondent, vs. KIMBERLY-CLARK COMPANY and another, imp., Appellants.

May 1—June 25, 1919.

Malicious prosecution: Evidence of plaintiff's good character and of wealth of joint defendants: Want of probable cause: Question for jury.

1. In an action for malicious prosecution, an admission of one of the defendants that up to the time of plaintiff's arrest upon a charge of theft he had known him as an honest man is material for the jury to consider.
2. Evidence that there was trouble between the parties, that plaintiff had been known as an honest man, and that the stolen goods had been found at a shanty used by plaintiff and others before plaintiff arrived there, is *held* to take to the jury the issue of want of probable cause.
3. In an action against more than one defendant for malicious prosecution, evidence of the wealth of the several defendants is inadmissible, though punitory damages may be assessed and though such evidence would be admissible if there were only one defendant.

APPEAL from a judgment of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Reversed.*

The plaintiff and three others were arrested upon the charge of having stolen a certain piece of tarpaulin belonging to the defendant *Kimberly-Clark Company* at its plant in the village of Niagara, Marinette county. Upon the hearing before the justice two of the defendants so charged

pleaded guilty, and the case was then dismissed as to plaintiff and the other defendant at the suggestion of the justice of the peace. The complaint was sworn to by the defendant *Stridde,* who was resident superintendent at Niagara for the *Kimberly-Clark Company* and acted herein on its own behalf. The defendant Max Gaber served the warrant in such proceeding, but on the trial the case was dismissed as to him.

The plaintiff alleges one cause of action for malicious prosecution and another for false imprisonment, both based upon the same transaction. The jury found against both defendants for each cause of action and assessed in each damages of $1,000 compensatory and $500 punitory, respectively.

Subsequent to verdict the plaintiff withdrew his claim on account of the alleged false imprisonment, and judgment was entered for the compensatory and the punitory damages assessed for the malicious prosecution. From such judgment the defendants appealed.

For the appellants there were briefs by *Hooper & Hooper* of Oshkosh, and oral argument by *Moses Hooper.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald F. Clifford,* all of Green Bay.

ESCHWEILER, J. Defendants set up as a defense that at the time of the swearing to the complaint before the justice of the peace upon which the criminal proceedings were prosecuted the defendants had probable cause to believe and did honestly believe that the plaintiff was guilty of the crime charged in such complaint. They insist that, there being no substantial dispute upon the facts, so far at least as they relate to such defense, there was such a situation presented as properly required the trial court, and now this court, to say that such defense was sustained as a matter of law.

The defendant *Stridde* frankly admitted on the trial that up to the time of the arrest in question he had known the

plaintiff as an honorable, honest man. This was material for the jury to consider. *Woodworth v. Mills,* 61 Wis. 44, 57, 20 N. W. 728. Plaintiff had been president of the village in which the defendant company's plant was located, and differences had arisen and apparently considerable feeling engendered out of questions arising from the administration of the village affairs. The property alleged to have been stolen was found covering the roof of the hunting shanty used by the party of four charged with the theft, but the testimony disclosed that it had been taken out there and placed on the roof before the plaintiff arrived. Without further detailing the evidence, we think the situation disclosed in the record herein was such that the court below was justified in submitting the question to the jury for them to determine whether or not there was a want of probable cause. *Eggett v. Allen,* 119 Wis. 625, 629, 96 N. W. 803; *Haas v. Powers,* 130 Wis. 406, 410, 110 N. W. 205.

With the determination of the jury that there was a want of probable cause and with the amount assessed by them as compensatory damages we cannot interfere.

The defendants also urge as ground for their objection to the judgment that the court below admitted, over objection, testimony as to the wealth or financial standing of each of the two appealing defendants.

The rule is well established that in an action against a defendant wherein exemplary damages may be properly awarded the plaintiff may show pecuniary ability of such defendant to pay a substantial sum as a proper element for the consideration of the jury in assessing the amount thereof. *Brown v. Swineford,* 44 Wis. 282, 291. Plaintiff here, however, having an option to sue one or more of the joint tortfeasors concerned in this transaction, has elected to sue more than one. Having so elected, whatever judgment is to be entered in such action must be entered as against all of such defendants found liable. Such defendants necessarily stand on the same footing so far as compensatory damages are con-

cerned, but when, for the purpose of enhancing what may be given by the jury for punitory damages, evidence is offered as to the financial ability of the one, it cannot but affect the amount of punitory damages to be recovered against the others, for these also must be assessed against all or none. There is no provision of the statute by which the amount of punitory damages may be assessed separately against the several defendants, and we have no inclination, even if we had the power so to do, to establish by decision any such innovation in favor of this element of damage. Where, as here, the financial ability of the several defendants is different, as manifestly it would be in the vast majority of cases, a number of authorities have held the admission of such evidence as against the one to be prejudicial error against the other, and we adopt that view. *Washington G. L. Co. v. Lansden,* 172 U. S. 534, 553, 19 Sup. Ct. 296; *Schafer v. Ostmann,* 148 Mo. App. 644, 651, 129 S. W. 63; *Stansberry v. McDowell* (Mo. App.) 186 S. W. 757, 762; *Strand v. Griffith,* 109 Fed. 597, 600; *Smith v. Wunderlich,* 70 Ill. 426, 437; *Chicago City R. Co. v. Henry,* 62 Ill. 142, 145; *Toledo, W. & W. R. Co. v. Smith,* 57 Ill. 517, 519; 13 Cyc. 212.

That evidence was received in this case as to the wealth of the two defendants and was not confined to that of one alone, as was the situation in the cases above cited, does not make the rule any the less applicable.

This requires a reversal of the judgment as a whole; but as we find no error so far as the question of compensatory damages is concerned, we deem it best to permit the plaintiff to have judgment upon the verdict for compensatory damages upon his filing his option so to do within twenty days after the return of the record to the court below, and in his default of so electing that then only a new trial shall be granted the defendants.

By the Court.—Judgment reversed, and the cause remanded with directions to permit the plaintiff to take judgment for the amount of the compensatory damages of $1,000

against the defendants, with interest on such amount from the entry of the verdict and with the costs as taxed in the circuit court. On default of such election the defendants to have a new trial.

ALSHULER, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

May 2—June 25, 1919.

Street railways: Operation of cars: Action for injuries: Collision with automobile: Evidence: Speed of street car: Violation of ordinance: Contributory negligence: Findings: Excessive damages: Appeal: Instructions.

1. In an action for injuries sustained in a collision between defendant's street car and plaintiff's automobile, struck from the rear, the jury's finding that the street car was moving at the rate of eighteen miles an hour is a sufficient basis upon which to rest their findings of actionable negligence, without reference to the breach of a city ordinance limiting the speed of street cars to twelve miles an hour.
2. The evidence in this case is *held* sufficient to sustain findings that defendant was negligent in operating its car at a speed of eighteen miles an hour, in failing to give warning of its approach, and in failing to keep a proper lookout; and also to show that plaintiff and her driver were not guilty of contributory negligence.
3. An award of $500 damages is clearly reasonable in this case in view of the evidence.
4. An instruction that the operation of a street car at a speed exceeding the limit fixed by a city ordinance is negligence in itself, if error, is not prejudicial where the findings of the jury sustain the judgment regardless of the question of violation of the ordinance.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an action by the plaintiff to recover damages for injuries alleged to have been received by her through alleged negligence of the employees of the defendant company.

On the evening of October 13, 1917, plaintiff and a party of friends were driving in the city of Racine in an automo-

bile owned by plaintiff and driven by her employee. At about 8 p. m. they were driving west on Twelfth street towards Wisconsin street, with the intention of turning south on Wisconsin street. The driver made the turn to the south and continued to drive along Wisconsin street until at a point about ninety feet south of the south line of Twelfth street the automobile was struck from the rear by a street car belonging to the defendant company. Plaintiff claims that she was permanently injured in the thigh and also suffered a severe shock to her nervous system. She alleges that the street car, contrary to the ordinances of the city of Racine, was being operated at a rate of speed exceeding twelve miles an hour; that the motorman failed to keep a proper lookout for vehicles upon the street; that the motorman of the defendant company failed to apply the brakes, reverse the current, and do the other things necessary to avoid colliding with her automobile; and as a second cause of action plaintiff charges gross negligence on the part of the motorman. The defendant company denies the allegations of negligence and charges that the driver of the automobile was guilty of contributory negligence.

The case was tried before the court and a jury. In a special verdict the jury found that the street car was being operated at a speed of eighteen miles along Twelfth street to the point of collision; that the street car was traveling at an excessive and dangerous rate of speed; that the motorman failed to give proper warning of his approach to Twelfth street; that he failed to sound his gong or bell at any time after the plaintiff drove upon Wisconsin street and down to the time of collision; that the motorman negligently failed to keep a proper lookout for travelers; that there was a want of ordinary care on the part of the defendant in the operation of its car at the time in question; that this want of ordinary care was the proximate cause of the plaintiff's injuries; that no want of ordinary care on the part of the plaintiff or her driver contributed to cause the injuries in question; that

$500 is a reasonable sum to compensate plaintiff for her injuries in question.

Judgment was entered awarding plaintiff $500 damages, from which judgment this appeal is taken.

For the appellant there was a brief by *Simmons & Walker* of Racine, and oral argument by *M. E. Walker.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Walter D. Corrigan.*

SIEBECKER, J. The defendant contends: (1) that the evidence does not sustain the jury's findings of actionable negligence; (2) that the facts and circumstances show that plaintiff and the driver were guilty of contributory negligence; (3) that the court committed prejudicial error in its instructions; (4) that the damages awarded for the injuries plaintiff received are excessive.

As above indicated, the jury found the defendant guilty of actionable negligence in conducting its street railway business at the time of the accident in these several respects: (1) in operating the car at an excessive and dangerous rate of speed; (2) in failing to give proper warning of its approach at the Twelfth-street crossing; (3) in failing to give warning of approaching plaintiff's vehicle from the rear on Wisconsin street immediately preceding the collision; (4) by the motorman's negligent omission to keep a proper lookout for plaintiff as a traveler on the street; and (5) by defendant's failure to exercise ordinary care in operating its car at the time of collision.

The jury found in answer to question 2 that the street car at the time of collision was traveling at a rate of eighteen miles per hour. This finding of the actual speed of the car establishes the groundwork upon which the jury's findings of actionable negligence may rest, and renders breach of the city ordinance limiting the speed of street cars to twelve miles per hour wholly immaterial as a criterion for determining

whether or not defendant negligently operated the car in question. Since the car was traveling at a speed of eighteen miles, the negligence of the motorman in the several respects found by the jury must be considered in the light of the actual speed of the car without reference to the speed limit fixed by the ordinance, and the court's instruction to the effect that it was negligent operation if the car traveled in excess of the speed prescribed by the ordinance is thus rendered wholly immaterial.

The verdict finds, and the evidence sustains the conclusion, that while the car actually traveled at the rate of eighteen miles per hour, the motorman failed to give any warning of his approach at the Twelfth-street crossing and while running on Wisconsin street, in following up plaintiff's automobile, which obviously he must have seen in front of him traveling in the same direction, and with which he collided. The fact that the car ran into the rear of the automobile leaves no ground for dispute but that the car exceeded the automobile in speed immediately before the collision. Under these conditions the motorman, had he exercised ordinary care, would have seen the automobile before the collision, and the facts and circumstances well nigh conclusively show that the car was being operated at so dangerous a rate of speed that it could not be safely controlled for the protection of plaintiff and her automobile, or that the motorman failed to exercise reasonable care in operating the car to prevent the collision which he must have observed to be imminent if he kept a proper lookout. Failure by the motorman to exercise reasonable care and precaution in either of these several respects was a breach of duty to the plaintiff as a traveler on the street and constituted actionable negligence.

We are satisfied that the evidence bearing on the issues presented questions for determination by the jury and that their findings must stand as verities in the case. It is strenuously insisted that the evidence in the case shows as a matter of law that the plaintiff and her chauffeur were guilty of contributory negligence. This claim is based on evidentiary

facts tending to establish the rate of speed plaintiff's automobile traveled at the time of crossing on Twelfth street and while driving south from this crossing on the west side of Wisconsin street to the point of collision.

The argument is made that if the evidence in the case be viewed in the most favorable light in plaintiff's favor respecting the course of the automobile on the street crossing and on Wisconsin street, and respecting the opportunity plaintiff and her driver had to see the street car before crossing on Twelfth street and after entering the crossing and driving southward on Wisconsin street, then it conclusively shows that the plaintiff and the driver were guilty of negligence in failing to see the approaching car or in carelessly driving into the zone of danger or in negligently driving onto the street-car track and turning to the left to cross it in face of the approaching car. We do not find this claim well founded. The facts showing the speed of the automobile, the course of its travel, and the opportunity of seeing and hearing the street car, under the facts and circumstances, permit of different inferences as to whether or not plaintiff and her driver were guilty of any want of ordinary care. The judgment of witnesses as to the time spent in driving over this course and of the distances traveled in a given period of time is not of such a nature as to negative conclusively the positive statements of the witnesses that they looked and listened for the car while so traveling on the streets. The jury was warranted in relying on the positive testimony of the witnesses tending to show that the plaintiff and her driver were not guilty of a want of ordinary care which proximately contributed to cause the collision.

The exception that the damages are excessive is not well taken. The amount awarded is clearly reasonable in view of the evidence on the subject.

The claim is made that a new trial should be granted because the court erred in its instruction to the effect that the operation of the street car immediately preceding the accident at a speed exceeding the twelve-mile limit fixed by the

city ordinance is negligence in itself. We do not find it necessary to consider this question in the view we take of the case. As above indicated, the jury found defendant guilty of actionable negligence in failing to give the required signals of its approach at the crossing, in failing to keep a proper lookout for plaintiff as a traveler rightfully on the street, and in failing to exercise ordinary care in operating the car in the light of the surrounding circumstances. These findings, in connection with the express finding that the car ran at a speed of eighteen miles, sustain the judgment regardless of the question of the violation of the city ordinance. It is considered that the instruction complained of had no effect on the jury in determining the questions of actionable negligence, and the reasonableness of such an ordinance need not be considered on this appeal.

By the Court.—The judgment is affirmed.

THOME, Appellant, vs. CRAWFORD, Respondent.

May 27—June 25, 1919.

Bills and notes: Payment of note: Evidence.

In an action to compel delivery of a note given by plaintiff to deceased and by deceased bequeathed to defendant, the evidence is *held* to sustain a finding that the note had not been paid.

APPEAL from a judgment of the circuit court for Monroe county: JAMES O'NEILL, Judge. *Affirmed.*

Action to compel the delivery to plaintiff of a promissory note of $5,000 given by him to Elizabeth J. Stringham and by her bequeathed to the defendant. The action is based on the ground that plaintiff had paid the note in full to Mrs. Stringham in her lifetime. The circuit court found that the note had not been paid and entered judgment dimissing the complaint, and the plaintiff appealed.

Howard Teasdale of Sparta and *Frank Winter* of La Crosse, for the appellant.

R. B. Graves of Sparta, for the respondent.

VINJE, J. Only a question of fact is presented by the appeal. Was the note paid? Plaintiff presented a receipt dated November 4, 1916, acknowledging full payment of the note and agreeing to deliver it to plaintiff within ten days. It is admitted that the receipt, which was typewritten, bears the genuine signature of Mrs. Stringham. It is claimed by plaintiff that this receipt was typewritten upon the same machine that another receipt for the interest of $150 that day paid was typewritten, at about the same time, and without change of ribbon or cleaning the type. The receipt for the payment of the note shows a sound ribbon and clean type. The one for the interest shows clogged type and a worn or broken ribbon. There is also a marked variance in the spelling. Plaintiff claims payment was made in cash. The proof shows that Mrs. Stringham went to the bank after receiving the check of $150 for the interest and deposited that together with a draft for $60 received from another person, but made no deposit of $5,000 that day or afterwards, and the record is barren of evidence showing what became of the money if it was paid. Mrs. Stringham left a personal estate of about $10,000, exclusive of the $5,000 note in question. Both plaintiff and Mrs. Stringham lived in Sparta and she did not die till about five months after he claims he paid the note, and yet he made no effort to get it from her during that time. Defendant claims Mrs. Stringham, who was about seventy-five years old, was induced to sign the receipt for the payment of the note in the belief that she was signing a receipt for the payment of the previous semi-annual interest, for which no receipt had been given. Such is in brief the nature of the case and the main character of the evidence from which the court found that the note was not paid. We cannot disturb the finding. It seems to be in accord with the weight of the evidence produced.

By the Court.—Judgment affirmed.

LEIDERSDORF, Respondent, vs. KRESS, imp., Appellant.

May 27—June 25, 1919.

Fraudulent conveyances: Liability of purchaser: Garnishment: Exemptions: Proceeds of bulk sale: Justices of the peace: Judgment against principal defendant: Evidence.

1. Where, without compliance with the bulk sales law (sec. 2317*c* *et seq.*, Stats.), a stock of goods and the fixtures were sold, together with a lease of the building, for $650, the stock and fixtures being worth $125, and on orders of the court and an execution the purchaser paid $534.36 to creditors of the seller, he could, on garnishment by a creditor of the seller, be held liable for the balance of $115.64 which he had turned over to the seller, it not appearing that it was not part of the purchase price of the goods and fixtures.
2. On the record in this case, the proceeds of the sale were not exempt from garnishment.
3. That a prior judgment had been entered against the principal defendant, necessary to authorize the judgment against the garnishee in the circuit court, is sufficiently shown by the record, the facts being stipulated, and the return of the justice of the peace to the circuit court, showing entry of such judgment, being made part of the stipulation.

APPEAL from a judgment of the circuit court for Washington county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The action was commenced in justice's court and judgment entered in favor of the garnishee and against the plaintiff, and an appeal taken to the circuit court, where a new trial was had. The facts were stipulated, and judgment was rendered in favor of the plaintiff and against the garnishee for the sum of $115.64 and costs.

The action was brought by the respondent against *Kress* as garnishee to hold him liable upon an indebtedness due from the defendant Meissner to the respondent under the provisions of sec. 2317*c* and sections following, known as the "bulk sales law." *Kress*, garnishee, purchased from the defendant Meissner his lease of a building used as a saloon, together with stock in trade and fixtures, for the sum of $650. While the garnishee held the purchase money in his

hands under a bill of sale, garnishee proceedings were commenced against him. There was also an execution in the hands of the sheriff against the defendant Meissner. The garnishee, *Kress,* paid from the purchase money in his hands, under orders of the court, $394.36 to creditors of defendant Meissner and upon an execution in the hands of the sheriff. He also paid the sum of $140 to a brewing company, another creditor of defendant, and the balance, $115.64, was paid to Meissner before the commencement of the present action. The garnishment in the instant action was not in aid of execution. The appeal in this action is from the judgment of the circuit court.

For the appellant there was a brief by *Russell & Foote* of Hartford, and oral argument by *J. C. Russell.*

For the respondent there was a brief by *S. Fred Wetzler,* attorney, and *Sol J. Weil,* of counsel, both of Milwaukee, and oral argument by *Mr. Weil.*

KERWIN, J. 1. It is clear from the record that no part of the proceeds of the sale in question was exempt.

2. Point is urged that there is not sufficient evidence to show that judgment was entered against the principal defendant, hence no judgment could be rendered against the garnishee. The facts were stipulated and the return of the justice of the peace to the circuit court was made a part of the stipulation, which shows that judgment had been entered against the defendant. We are satisfied that the record shows that judgment was rendered against the defendant.

3. It is also argued that because the garnishee had paid to creditors from the purchase price more than the value of the stock of goods and fixtures, he could not be held liable in the present garnishee action. The garnishee bought the stock and fixtures and a lease for a bulk sum of $650. It is conceded that the purchase was in violation of the bulk sales law. All but $115.64 of the purchase price had been paid to creditors of defendant and the $115.64 turned over to defendant before the instant garnishment. It is contended that because

the stock and fixtures were of the value of $125 only, it must be presumed that all the proceeds reachable by the garnishee proceedings had been exhausted. But there is nothing in the record to show that the amounts disbursed, or any part thereof, to creditors by the garnishee were paid from the purchase price of goods and fixtures. The whole amount paid before the garnishment in this action, aggregating $534.36, may have been paid from the purchase price of the lease, and the balance in the hands of the garnishee, which he turned over to the defendant, may have been the purchase price of the goods and fixtures. We think the court below was warranted in so finding.

We are convinced upon the whole record that the court below was right in holding that the garnishee was liable to the plaintiff for the balance of the purchase price, $115.64, paid to the defendant.

By the Court.—The judgment is affirmed.

HOBERG, Respondent, vs. MCNEVINS and another, Appellants. [Six Cases.]

May 28—June 25, 1919.

Specific performance: Corporations: Sale of stock: Consideration: Option to repurchase: Waiver of objection: Offer to resell stock: Statute of frauds: Contract to retransfer stock: Uncertainty: Parol evidence: Transactions at stockholders' meetings: Power of court to decree specific performance: Transfer by contracting parties: Separate bills of costs: Actions not consolidated.

1. Where a corporation purchased its own stock in consideration of the cancellation of the indebtedness of the sellers, such stock being later distributed as a stock dividend pursuant to an agreement between the corporation and the stockholders receiving the dividend, and certain of the stockholders signed an agreement to retransfer said stock to the original owners within three years for the price paid therefor, all who signed the agreement were bound thereby when all signed who it was understood were to sign.

2. The objections that there was no legal acceptance of the option to repurchase and that there was a failure in the description of the shares must be deemed to have been waived by the silence of the stockholders as to such points when demands were made upon them for retransfers of the stock and by their assertion of and their apparent reliance upon other grounds for refusal.
3. The agreement was not void under the statute of frauds for uncertainty, as failing to specify the exact number of shares demanded from each of the purchasing stockholders.
4. Where certain of the stockholders who had participated in the stock dividend agreed to retransfer the stock so received within three years at a stated price, but reserved the right to sell to others, such reservation did not nullify the right of the original owners to repurchase in the absence of the exercise of the right reserved.
5. Where the purchase of its stock by a corporation, the cancellation of the stockholders' indebtedness to the corporation, and the agreement that the sellers were to have, for three years, the option of repurchasing the stock at the price paid, were all parts of the same transaction, there was ample consideration to support the promise on the part of other stockholders, to whom the purchased stock was issued by the corporation, to keep the resale offer alive for three years.
6. The rights of the parties to the transaction having been established by what took place at a stockholders' meeting and not being dependent on the written contract, which, as made and partly performed, was taken out of the statute of frauds, evidence as to the oral transactions at the meeting was not inadmissible as tending to vary, affect, or change a written contract.
7. The transfer by certain of the defendants to their spouses of the stock received by them did not put it beyond the power of the court to decree specific performance of their agreement to retransfer to the stockholders who sold.
8. In separate actions for specific performance of the written agreement, the allowance by the court of separate bills of costs was not erroneous, there having been no consolidation and each action being of such a nature as not to permit the joinder of any of the defendants in the other actions and the rights of the plaintiffs being several and not joint. Nor does the situation come within the provisions of sec. 2919, Stats.

APPEAL from six several judgments of the circuit court for Brown county: W. B. QUINLAN, Judge. *Affirmed.*

John J. Hoberg and *Maud Hoberg,* his wife, for some time prior to January 13, 1915, were indebted to the John Hoberg Company, a corporation, for about $22,700, and certain shares of stock owned by them in such corporation were held by it as collateral security.

The John Hoberg Company was organized with a capital stock of $45,000 and had, at the time of the transactions in question, assets worth many times the face of its capital stock. All of its stock was held by the family of John Hoberg, the original founder of the business, and one Henry Goethe, the secretary of the company.

At the annual meeting of the company on January 13, 1915, which was attended by all the stockholders and the persons interested herein, a resolution was duly made and carried to offer to *John J. Hoberg* and *Maud Hoberg,* his wife, $128 per share for so many of the shares of the capital stock held by them respectively as would be sufficient at that rate to meet and cancel their indebtedness to the company. At the same meeting and by unanimous consent the stock so purchased by the company in cancellation of such indebtedness was distributed among all the stockholders of said company substantially in the proportions in which they held stock in the company.

Pursuant to a discussion had at the same meeting a written agreement was drawn and dated January 16th, reading as follows:

"We, the undersigned, having each of us bought a certain amount of shares of the John Hoberg Company's capital stock from *John J. Hoberg* and his wife, *Maud Hoberg.* We agree to resell to them within (3) years from date hereof these shares as each of us bought, for the same amount per share as we paid them per share, provided these such shares are not sold by us to another party during these three years time.

"ANTON HOBERG.
"HENRY GOETHE.
"FRANK H. HOBERG.
"WM. HOBERG.
"ROSE MCNEVINS."

This was signed by all of the stockholders save the widow of the senior Hoberg and by one of the sisters-in-law. In May or June, 1917, a demand was made by *Maud* and *John J. Hoberg* respectively upon each of the signers of said writing for a retransfer of such shares and a tender made to them respectively of the amounts according to the purchase price fixed at the meeting of January 13, 1915. Certain of the signers complied with such request. The several defendants herein having refused so to do, separate actions were brought by *John J. Hoberg* and *Maud Hoberg* against each of such defendants to have such stock retransferred to them.

By stipulation the six separate actions were tried together, but separate findings and judgment made in each.

The court made findings as to the facts substantially as above recited and also to the effect that the alleged transfers by certain of the defendants of such stock so received by them on account of the transaction of January 13, 1915, to their respective spouses were shams, without consideration, and for the intent, concurred in by the persons taking part therein, to defeat said plaintiffs' respective rights to repurchase, and that such alleged transfers have never been made on the books of the company.

As conclusions of law the court found that there was a valid contract for the retransfer of the several amounts of stock and that the respective plaintiffs were entitled to specific performance thereof upon their respective tenders of the amounts; that the pretended transfers of stock by certain of the defendants to their respective spouses were void, and that the respective plaintiffs were in each of the cases entitled to a judgment requiring a retransfer and delivery of such stock upon payment; and that each was entitled to dividends that had been paid upon such stock between June 1, 1917, and the entry of judgment; together with costs and disbursements.

From the respective judgments entered in accordance with such findings the defendants have appealed. The six sev-

eral appeals were heard as one, with the understanding that the disposition to be made of the one should control as to all.

For the appellants there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald F. Clifford* and *Joseph F. Martin,* all of Green Bay.

For the respondent there was a brief by *John A. Kittell* and *Greene, Fairchild, North, Parker & McGillan,* and oral argument by *Mr. J. R. North* and *Mr. Kittell,* all of Green Bay.

ESCHWEILER, J. The objections to the judgments entered by the court below are substantially as follows: (1) That the written agreement set forth above, dated January 16, 1915, was not a valid and binding agreement because the defendants were not to be bound by such writing until and unless it were so signed by all of the stockholders participating in the meeting of January 13, 1915, and that two of such stockholders did not sign; (2) that there was no legal acceptance of the writing of January 16th, if such were an option; (3) that such writing is void under the statute of frauds for uncertainty; (4) that it is null and void on the theory that, there being a reservation of the right to sell to third persons, there can be no exclusive right to purchase given; (5) that there was no consideration for the promise to keep the offer open for three years, and that it could be and was revoked; (6) that oral testimony was improperly admitted as to the transactions at the meeting of January 13th so far as such tended to affect or change the writing of January 16th; and (7) that such of the defendants as had transferred or delivered their respective certificates of stock to their respective spouses had the right so to do as against the plaintiffs and that the court should not have disregarded such transactions; and further (8) that the court erred in allowing separate bills of costs in each of said six actions.

The court found and the evidence supports the finding that at the meeting of January 13th, where the matter was

discussed respecting the cancellation of the indebtedness of *John J. Hoberg* and *Maud Hoberg* to John Hoberg Company, it was then understood by all present that two of the then present stockholders, though consenting to the purchase by the company of the stock and its distribution among the respective stockholders, did not and would not consent to be bound to retransfer such stock they respectively would receive as a result of the transaction. As a result of such finding, which was upon disputed evidence, the defendants were properly held to have become bound when all signed who it was understood were to sign.

The second objection, to the effect that there was wanting in this case a sufficiently legal acceptance of the option to repurchase, is based upon the contention that inasmuch as the writing of January 16th recited that a certain amount of shares of the capital stock of the John Hoberg Company had been bought by each of the signers from *John J. Hoberg* and his wife, *Maud,* while the undisputed fact was that the shares in controversy had been purchased by the corporation and not by the individuals and then distributed or divided by the corporation, that therefore the description in the writing of January 16th did not fit such dividend stock. A further objection is made on the ground that, inasmuch as it appeared that there was a slight discrepancy in the exact number of shares ultimately received by such individual stockholders on the dividend distribution from that which was their respective exact proportionate amount, there was a failure in description. This discrepancy arose from the fact that in the distribution certain stockholders received fractional shares, and by agreement among themselves such fractional shares were bought up by two of the stockholders so that the distribution might be of undivided shares.

Under the undisputed facts and those found by the court where there was any dispute, neither of these objections could well be considered material, and in any event they must be deemed to have been waived by the silence of the de-

fendants as to such points at the time when the demands were made upon them for the retransfers and their assertion of, and apparent reliance upon, other distinct grounds for their refusal to comply with such demands.

The third objection, to the effect that the writing is void under the statute of frauds for uncertainty on the ground that it fails to specify the exact number of shares demanded from each defendant respectively, is not well taken. There was sufficient in the notice itself, together with the surrounding facts and circumstances with knowledge of which the defendants were properly charged, to warrant the court below in making the disposition of this objection that it did. *Inglis v. Fohey,* 136 Wis. 28, 33, 116 N. W. 857.

Fourth, that the reservation of the right to sell was a nullifying of any right of purchase, is not under the facts a valid objection. Before there had been any *bona fide* sale or transfer of the stock demand was made for a retransfer. Therefore the right which they reserved unto themselves of making a sale and disposition of such stock at any time within the three years had not been exercised by them, and was still dormant at the time of the demand. Having failed to exercise the right so reserved by themselves to themselves, they cannot be heard to successfully interpose such unexercised right to defeat the plaintiffs in the exercise of their right given to them by defendants.

The fifth point is in effect that there was no consideration for the promise on the part of the defendants to keep the offer alive for three years, and, there being no consideration, such promise was not enforceable, and in any event could be and was revoked.

If the agreement to sell such stock had been made subsequent to and independent of the purchase by the company of the stock and cancellation of the indebtedness there might be force and merit in this and in several of defendants' contentions. It is found by the court, and the evidence supports such finding, that this was all in effect one transaction; the purchase by the company, the cancellation of the indebted-

ness, and the agreement that the plaintiffs were to have the option of obtaining their stock back again. As one indivisible transaction there was ample consideration to support it and all parts thereof.

What has been said on the preceding propositions disposes of and dismisses the sixth point raised, which is to the effect that it was improper to receive or consider evidence as to the oral transactions at the meeting of January 13th as tending to vary, affect, or change the writing of January 16th. The rights of the parties were established by what took place at the meeting and are not dependent upon the writing itself. The contract then made and partly performed was taken out from the statute of frauds. *Hankwitz v. Barrett,* 143 Wis. 639, 128 N. W. 430. The plaintiffs, therefore, do not need to base their right to recover upon the writing of January 16th. It only served the purpose of additional evidence as to the transaction.

The seventh objection is to the effect that the transfer by certain of the defendants to their respective spouses of the shares of stock in question put it beyond the power of the court to decree specific performance of the agreement to retransfer. What has been said above on the other objections sufficiently indicates the proper disposition to be made of this objection. There was no such *bona fide* sale as was the evident intent of both letter and spirit of the contract there must be.

As to the taxation of costs: there having been no consolidation of the six cases so as to make but one action, and the actions being each of such a nature that it would not permit of the joinder of any of the defendants in the other actions therein, and the rights of the plaintiffs being several and not joint, as against the several defendants, there was no error by the court in allowing the separate bills of costs, nor does the situation come within the provisions of sec. 2919, Stats., as contended for by defendants.

By the Court.—Judgments affirmed.

EHLERS, Administratrix, Appellant, vs. AUTOMOBILE LIABILITY COMPANY, Respondent and Appellant, and another, imp., Respondent.

May 28—June 25, 1919.

Municipal corporations: Automobile operated "in the service of a common carrier:" Use of streets: Accident in street: Carrying passengers: Indemnity bond: Amount of recovery for death: Damages to estate: Evidence: Damages to two persons: Amendment of answer: Laches: Trial: Special findings: Effect of inconsistency: Subdivision of inquiries: Discretion of court: Review.

1. An automobile is being operated "in the service of a common carrier," within the terms of an indemnity bond, not only when carrying passengers on its route, but when running to a repair shop for repairs to enable it to continue its service as a common carrier.
2. In an action against an automobile owner and his insurer, the court properly denied the application of the defendant indemnity company to amend its answer to show that the car in question was not covered by the indemnity bond, such application not being made until the trial was almost completed and no claim being made that the defendant company did not know such fact at the commencement of the trial.
3. In an action by a widow for the death of her husband, a finding of the jury that the damages to his estate, exclusive of pain and suffering, amounted to $4,000, are *held* not to be sustained by evidence showing that there was expended for medical attendance, nurses, and funeral expenses $779 and that the loss of wages by deceased prior to his death did not exceed $60.
4. Where damages to the deceased and his estate and also to the widow for her pecuniary loss under secs. 4255, 4256, Stats., were shown, it is *held* that there were "damages to two persons" within the meaning of the bond given under sec. 1797—63, conditioned for payment of damages not exceeding $2,500 to any one person or $5,000 for any one accident that may be recovered against a vehicle operator while in the service of a common carrier.
5. Where special interrogatories were submitted to the jury, its findings that the defendant whose automobile struck deceased used ordinary care in operating it in a crowded street and that he failed to exercise ordinary care in looking ahead to see who might be there, were so manifestly inconsistent as to render a new trial necessary.

6. The form of a special verdict rests in the sound discretion of the trial court, and that discretion will not be interfered with so long as the issues of fact in the case are covered by appropriate questions.
7. Where special interrogatories were submitted to the jury, it is discretionary with the trial court to determine whether an inquiry as to whether the defendant, whose automobile caused the death of the deceased, was guilty of a want of ordinary care in operating his automobile, should be subdivided into inquiries whether the city ordinances as to lighting and speed were disobeyed and whether rain and other conditions interfered with defendant's operation of his car.

APPEALS from an order of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed on both appeals.*

John Ehlers, the husband of the plaintiff, was run over by an automobile owned and operated by the defendant *Gold* and suffered injuries from which he afterwards died. This action is brought to recover upon two causes of action: first, the cause of action accruing to the deceased and his estate for pain and suffering, medical and funeral expenses, etc., and second, the cause of action accruing in favor of the widow for her pecuniary loss resulting from her husband's death under secs. 4255, 4256, Stats. (Lord Campbell's Act).

The defendant *Gold* owned and operated a Ford car at the time, which was licensed as a common carrier over certain routes in the city of Milwaukee, and the *Liability Company* had given an indemnity bond as required by sec. 1797—63, Stats., conditioned that it would "pay all damages, not exceeding $2,500 to any one person, or $5,000 for any one accident that may be recovered against the operator of the vehicle" by reason of the negligent use or operation thereof "while said motor vehicle is being operated in the service of a common carrier as defined by chapter 546, Laws of Wisconsin, 1915" (secs. 1797—62 to 1797—68, Stats.).

At dusk on the evening of October 12, 1916, the defendant *Gold* was driving his automobile eastward on North ave-

nue in the city of Milwaukee, and the deceased, a foot passenger walking northward, was crossing said North avenue at its intersection with Hubbard street and on the east side of said last named street. A rain was falling, the streets were slippery, and the wind-shield up. The deceased was carrying an umbrella, the defendant *Gold* was driving astride of the south rail of the south street railway track on North avenue, and did not see the deceased till about eight feet distant, at which time the deceased was about to step onto the said south rail of the street railway track. *Gold* thought he was too near the deceased to sound his horn or stop his car and that the only thing he could do was to turn out to the north, which he did, but did not succeed in turning out far enough to avoid striking the deceased. The jury rendered the following special verdict:

"(1) Did the collision between the automobile operated by the defendant *Gold* and the deceased, John Ehlers, happen before or after 5:45 o'clock p. m. of October 12, 1916? *A.* Before 5:45 o'clock.

"(2) At and just prior to the collision were the headlights on the front of defendant *Gold's* automobile lighted so as to give a reasonably bright light in the direction in which said automobile was going? *A.* No.

"(3) If you answer question No. 2 'No,' then answer this question: Was such failure to have the headlights so lighted at that time and place a proximate cause of the injuries to the deceased? *A.* Yes.

"(4) At and just prior to the collision was defendant *Gold's* automobile operated at a speed in excess of fifteen miles per hour? *A.* No.

"(5) If you answer question No. 4 'Yes,' then answer this question: Was the operation of defendant *Gold's* automobile at said time and place at a speed in excess of fifteen miles per hour a proximate cause of the injuries to the deceased? (No answer.)

"(6) Did the defendant *Gold,* at and just prior to the collision, fail to exercise ordinary care to ascertain whether any person was crossing North avenue so as to come within the course of his automobile? *A.* Yes.

"(7) If you answer question No. 6 'Yes,' then answer this question? Was such failure on defendant *Gold's* part to use ordinary care a proximate cause of the injuries to deceased? *A.* Yes.

"(8) Did the defendant *Gold* fail to use ordinary care to avoid a collision with deceased after the deceased reached the point where, in the exercise of ordinary care, he could have been discovered by the defendant *Gold?* *A.* No.

"(9) If you answer question No. 8 'Yes,' then answer this question: Was such failure on the part of the defendant *Gold* to use ordinary care a proximate cause of the injuries to the deceased? (No answer.)

"(10) Did the defendant *Gold* fail to exercise ordinary care in the operation and management of his automobile at and just prior to the time when the deceased was struck thereby? *A.* No.

"(11) If you answer question No. 10 'Yes,' then answer this question: Was such failure on the part of defendant *Gold* a proximate cause of the injuries to the deceased? (No answer.)

"(12) Ought the deceased, in the exercise of ordinary care, to have seen the automobile in time to have avoided the collision? (No answer.)

"(13) If you answer the twelfth question 'Yes,' then answer this question: Did the failure of the deceased to see the automobile in time to have avoided the collision proximately contribute to produce his injuries? (No answer.)

"(14) Did any want of ordinary care on the part of the deceased proximately contribute to produce his injuries? *A.* No.

"(15) If the court should be of the opinion that the plaintiff is entitled to recover, at what sum do you assess such damages:

"(a) Damages to the estate of the deceased exclusive of pain and suffering? *A.* $4,000.

"(b) For pain and suffering? *A.* $1,000.

"(c) For pecuniary injury sustained by deceased's widow as a result of the death of John Ehlers? *A.* $774."

The circuit judge held that the damages awarded to the estate of the deceased under subdivision (a) of the fifteenth question were excessive and, without considering any other

question, set aside the verdict and ordered a new trial. From this order both the plaintiff and defendant *Liability Company* appeal.

Chas. T. Hickox of Milwaukee, of counsel, for the appellant *Ehlers.*

For the *Automobile Liability Company* as appellant there was a brief by *J. Elmer Lehr,* attorney, and *Edgar L. Wood,* of counsel, both of Milwaukee, and oral argument by *Mr. Wood.*

For the respondent *Gold* there was a brief by *S. R. Simon,* and oral argument by *H. B. Walmsley,* both of Milwaukee.

WINSLOW, C. J. The defendant *Gold* was not carrying passengers on his route at the time of the accident, but had quit for the day and was driving his machine to a repair shop to have some necessary repairs made. By reason of these facts it is claimed by the defendant *Liability Company* that the machine was not being operated "in the service of a common carrier" at the time of the accident, and hence that there is no liability on the bond.

We are well satisfied that such a construction of the bond would be entirely too narrow. *Gold* was not going on a private errand nor operating his machine for any private purpose at the time, but was taking it to a repair shop to have it repaired. Reason and good sense seem to us to require the holding that such a machine is being operated "in the service of a common carrier" not merely while it is carrying passengers on its route, but while it is running to a repair shop to receive the repairs necessary to enable it to continue its service as a common carrier.

Near the close of the trial the defendant *Liability Company* moved to amend its answer by withdrawing certain admissions in the answer, and offered to prove that the defendant *Gold* sold the car covered by the indemnity bond some six weeks before the accident and purchased a new car which he was using at that time and which was not covered

by the indemnity bond in suit. The court denied the motion, partly on the ground that the application for the amendment was not timely, and we see no good reason to reverse this ruling. Apparently the defendant knew the alleged facts for a considerable time before the trial of the action began, at least no claim was made that its knowledge had been recently acquired, and it allowed the admission in the answer to the effect that its bond covered the machine used by *Gold* to stand until the trial of the case was almost finished. We cannot say that under the circumstances it was an abuse of discretion to deny the motion. It is quite apparent that there was no proof to justify the finding of the jury that the damages to the estate, exclusive of pain and suffering, amounted to $4,000. The evidence was not in dispute on this question and showed that there was expended for medical attendance, nursing, hospital charges, and funeral expenses $779, and that the loss of wages during the five weeks which the deceased lived after the accident was about $50 or $60. It seems very apparent that the jury by mistake transposed the answers to subdivisions (a) and (c) of the fifteenth question. The plaintiff argues strongly that the mistake is so obvious that the court would be justified in transposing the figures and entering judgment on the verdict as so amended. We do not find it necessary to decide this question because of other defects in the verdict, to be now considered, which seem to us to make it fatally inconsistent. It may be said in passing, however, that, conceding that the transposition could not be made, still there seems no reason why the plaintiff should not have been given the option (if the verdict were otherwise sufficient) to remit from the $4,000 item enough to reduce it to $779, the amount undisputedly proven by the evidence, and to take judgment for the sum of the three items after such reduction.

In our judgment there were damages to two persons here arising out of one accident, hence the limit of recovery would be $5,000 under the wording of the bond.

The difficulty which we find with the case is the manifest inconsistency of certain vital findings.

The jury found by their answer to the first question that there had been no violation of the city ordinance with regard to the lighting of headlights, because the ordinance only required such lighting on the night in question at 5:45 p. m. and the accident happened before that hour.

By their answer to question 4 the jury found that *Gold* had not violated the speed limit fixed by the city ordinances. This leaves but one finding of negligence in the verdict, namely, the finding in answer to question 6 to the effect that *Gold,* "at and just prior to the collision," failed to exercise ordinary care to ascertain whether any person was crossing North avenue so as to come within the course of his automobile. This failure, being found by the answer to the next question to be a proximate cause of the injury to the deceased, would doubtless amount to actionable negligence, but the difficulty is that it is neutralized by the answers to questions 8 and 10, and especially the latter. If *Gold,* at and just prior to the collision, failed to exercise ordinary care to ascertain whether any person was crossing North avenue so as to come within the course of his machine, he necessarily thereby failed to exercise ordinary care in the operation of his automobile, because the keeping of a lookout for people who may be in the way is a part of the operation of the automobile. It could not be said that a man used ordinary care in the operation of an automobile in a crowded street if he failed to exercise ordinary care in looking ahead to see who might be in the way. This seems certain. This inconsistency is fatal to any recovery by the plaintiff and makes a new trial necessary. The plaintiff argues that the evidence establishes the negligence of *Gold* as matter of law, but we have not been able to reach that conclusion.

The inconsistency in the verdict brings sharply to the mind the danger always present when a special verdict is long and complicated, namely, the danger of a mistake. The writer

has been on the trial bench himself and has struggled with the framing of special verdicts and knows that it is not always an easy task. What is said now is said in no spirit of fault-finding or lecturing of trial judges in the performance of their difficult duties, but simply with hope of assisting them if possible. The questions at issue in the present case were not numerous or complicated. There were four fundamental inquiries, viz.: (1) Was *Gold* guilty of want of ordinary care in the operation of his automobile? (2) If so, was it the proximate cause of the accident? (3) Was the deceased guilty of contributory negligence? and (4) What damages resulted? Doubtless a verdict composed of these four questions and their answers would cover the case. *Anderson v. Sparks,* 142 Wis. 398, 125 N. W. 925; *Guillaume v. Wis.-Minn. L. & P. Co.* 161 Wis. 636, 155 N. W. 143. The form of the verdict rests in the sound discretion of the trial court, and that discretion will not be interfered with so long as the issues of fact in the case are covered by appropriate questions. *Anderson v. Sparks, supra.* In the present case it would be discretionary with the trial court to determine whether the first inquiry should be subdivided so as to ascertain by separate questions and answers whether the city ordinances as to lighting and speed were disobeyed, and whether, in view of the rain and other conditions at the time, *Gold* failed to exercise due care in operating his machine as he approached the crossing. Any further multiplication of questions becomes practically a cross-examination of the jury on purely evidentiary matters.

By the Court.—Order affirmed on both appeals. No costs to be taxed except the fees of the clerk of this court, which are to be taxed and paid by the respondent *Liability Company.*

ANGERSTEIN, Respondent, vs. MILWAUKEE MONUMENT COMPANY, Appellant.

May 28—June 25, 1919.

Negligence: Sufficiency of complaint: Privilege of physicians and surgeons: Waiver by patient.

1. The privilege granted by sec. 4075, Stats., to physicians and surgeons is a privilege in favor of the patient, and a patient may waive it and have the physician testify in a personal injury action.
2. A complaint alleging that plaintiff, standing in her yard, was struck by a granite chip which flew from a surfacing machine operated in defendant's monument yard adjacent to her premises, and charging defendant with negligence in failing to properly guard against flying chips, is *held* to state a cause of action.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff for personal injuries which she claims to have received through carelessness on the part of the defendant.

The monument yard of the defendant company is north of and adjoining the yard of the house where the plaintiff and her husband live. On August 22, 1916, plaintiff, while in the act of removing the wash from a line in her yard, was struck in the eye by a rock chip set in motion by operations carried on by workmen employed at defendant's machines. She claims that the workmen were operating a surfacing machine and that one of the workmen was using a hammer and chisel on a granite block fifteen feet north of the fence dividing plaintiff's and defendant's premises, and that she was standing approximately twenty feet away from workmen and machine when she was struck by the rock chip. Plaintiff charges defendant with negligence in failing to protect her properly by screens or other devices from flying rock chips. She alleges that she has suffered great physical and mental pain since the accident and that she has been since

then entirely unable to perform her household duties. Defendant denies all of the allegations of plaintiff's complaint. The civil court jury found the defendant guilty of a want of ordinary care as alleged in the complaint, and found that the plaintiff had been struck by a rock chip and that such want of care of defendant was the proximate cause of her injuries. Judgment was entered on the verdict, and the defendant appealed from that judgment to the circuit court for Milwaukee county. The circuit court affirmed the judgment of the civil court on the record, and appeal is taken from that judgment.

For the appellant there was a brief by *Nohl & Nohl* of Milwaukee, and oral argument by *Leo F. Nohl.*

William O. Meilahn of Milwaukee, for the respondent.

SIEBECKER, J. The defendant assigned error upon the grounds (1) that the evidence of the physicians who treated plaintiff was improperly received; (2) that the court improperly held that the complaint alleged a cause of action for ordinary negligence; (3) that the evidence fails to sustain the finding of the jury that defendant was guilty of actionable negligence; and (4) that the damages are excessive.

The evidence of plaintiff's physician was properly received. The privilege granted by sec. 4075, Stats., is a privilege of the patient, and plaintiff in the instant case had the right to waive it. *Markham v. Hipke, ante,* p. 37, 171 N. W. 300. The court, within the rule of *Haverlund v. C., St. P., M. & O. R. Co.* 143 Wis. 415, 128 N. W. 273, and *Astin v. C., M. & St. P. R. Co.* 143 Wis. 477, 128 N. W. 265, was clearly right in holding that the complaint alleged a cause of action for ordinary negligence. It also appears that the trial proceeded in accordance with this ruling and that defendant offered evidence to show plaintiff's alleged contributory negligence. We find nothing in the record tending to show that defendant was in any way prejudiced by this ruling of the trial court. An examination of the evidence

discloses that the jury's findings on negligence and the amount of damages awarded are amply sustained by the evidence and cannot be disturbed on appeal.

By the Court.—The judgment appealed from is affirmed.

GERSTEIN, Respondent, vs. C. F. ADAMS COMPANY, Appellant.

May 29—June 25, 1919.

Master and servant: Liability of employer for assault by employee: Appeal: Harmless error: Instructions.

1. Where defendant's employees, in the course of their employment, assaulted plaintiff while endeavoring to take possession of a clock upon which plaintiff had failed to make an instalment payment then due, defendant was liable although it did not authorize the procedure employed.
2. It being undisputed that the defendant's employees, when they took the clock, were acting in the course of their employment, an instruction to the jury that they should find for the plaintiff if the defendant's employees assaulted her was not error though it did not also embrace the question whether the assault was committed while the employees were acting in the course of their employment; especially is this so in view of the fact that the defendant did not request a more favorable instruction.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This action was commenced in the civil court of Milwaukee county to recover damages for assault and battery. The complaint alleges, among other things, that the defendant by its agents and servants committed an assault and battery upon the plaintiff, and that she sustained damages thereby. The answer denies the allegations of the complaint. The plaintiff testified that at 9:30 o'clock in the forenoon, November 14, 1917, the defendant's employees entered her home and forcibly took a clock from her premises and committed an assault and battery upon her while so removing

said clock. The evidence further shows that the employees of defendant, when they took the clock, were attempting to collect instalments due thereon which had not been paid.

A general verdict was rendered in favor of the plaintiff assessing damages at $685. An appeal was taken to the circuit court, where the judgment of the civil court was affirmed. Defendant appealed to this court.

The cause was submitted for the appellant on the brief of *John H. Paul,* attorney, and *Walter D. Corrigan,* of counsel, both of Milwaukee, and for the respondent on that of *Robert A. Hess* of Milwaukee.

KERWIN, J. The evidence in this case tends to show that the employees of the defendant, at the time of the alleged injury, were attempting to collect the balance due on a clock sold and delivered by defendant to plaintiff; that said employees forcibly took the clock from the home of plaintiff and in so doing committed an assault and battery upon her, kicking and severely injuring her; that they forcibly took possession of the clock after plaintiff had failed to pay the balance due. Said employees denied that they assaulted or beat plaintiff or used any force in taking the clock. Plaintiff testified that at the time in question she was alone and that the employees of the defendant came to her home and demanded all the money due on the clock; she said she owed $3 and would pay fifty cents and the balance later, but one of the employees said, "No, I have to have all the money." Then they entered the room where the clock was and immediately took it, and she tried to stop them and they tore her waist and one of them gave her a punch in the abdomen and she fell. They ran away, taking the clock with them, and she lay on the floor half an hour and could not get up; that she bought the clock on the instalment plan.

The evidence is practically undisputed that the clock was taken by the employees of the defendant while engaged in the course of their employment, hence their employer, the

defendant here, was liable for the negligent or wrongful act of its servants committed while endeavoring to perform a duty delegated to them by the master, notwithstanding the method adopted by the servants may not have been authorized, and even may have been prohibited, by the master. *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276; *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304; *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424; *Daley v. C. & N. W. R. Co.* 145 Wis. 249, 129 N. W. 1062; *Craker v. C. & N. W. R. Co.* 36 Wis. 657. The instant case is ruled by the foregoing cases.

It is insisted that the court erred in the following charge to the jury:

"With these definitions in mind, you are instructed that if you are satisfied to a reasonable certainty by a preponderance of the evidence that one of the defendant's servants or employees committed an assault and battery upon plaintiff on November 14, 1917, then your verdict will be for the plaintiff."

It is contended that this charge was error for the reason that the court should have embraced in the charge the question whether the assault and battery was committed while the servants were acting within the course of their employment. As before observed, the evidence is substantially uncontradicted that the employees were acting within the course of their employment at the time they took the clock, hence there was nothing in the record calling for any different instruction than that given by the court. Moreover, if appellant desired a more favorable instruction than that given it should have requested it, which it failed to do.

We are satisfied that there was no prejudicial error in the charge as given, and that the judgment below must be affirmed.

By the Court.—Judgment affirmed.

W. H. SHENNERS COMPANY, Respondent, vs. DELZER, Appellant.

May 29—June 25, 1919.

Brokers: Contract for commissions: Trial: Correction of verdict to conform to proof: Appeal: Errors assigned and argued: Review: Credibility of witnesses.

1. On appeal to this court, generally only errors assigned and argued in the brief will be considered.
2. Where in an action by a broker for commissions for securing an exchange of property for defendant the defense was fraud in securing the contract, and a single witness for the plaintiff testified that defendant read the contract before he signed it, and the jury, as triers of the fact, evidently believed the witness, a general verdict for plaintiff cannot be said not to be based on competent credible evidence.
3. The jury could not properly ignore in their verdict the terms of a valid contract between the parties.
4. Where there was no conflict in the evidence on the subject of damages from defendant's breach of contract to pay plaintiff a commission, the court properly corrected the amount of the verdict to conform to the proof.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action begun in the civil court of Milwaukee county to recover $200 as commission for securing an exchange of property for defendant under a written contract therefor, and $30 the cost of an abstract which defendant was to furnish and which plaintiff caused to be prepared. The defense was that the written contract was procured by fraud. There was evidence to the effect that the actual cost of the abstract was only $21.

The jury by a general verdict found for plaintiff and assessed its damages at the sum of $66.67. Plaintiff's motion to amend the verdict by inserting as damages the sum of $221 instead of $66.67 was granted and judgment for plaintiff was entered accordingly. Upon defendant's appeal to the circuit court the judgment of the civil court was affirmed, and the defendant appealed.

The cause was submitted for the appellant on the brief of *Adolph Kanneberg* of Milwaukee, and for the respondent on that of *A. A. Cooper* of Milwaukee.

VINJE, J. The case was submitted by both parties without oral argument. Appellant assigns a number of errors that are not argued in his brief. Generally only those argued will be considered. *My Laundry Co. v. Schmeling,* 129 Wis. 597, 109 N. W. 540; *Sherwood v. Hulett,* 134 Wis. 561, 114 N. W. 1111.

The gist of the defense was fraud in securing the written contract, and it is contended that the witness for plaintiff who testified to the making of the contract and that defendant read it before he signed is not worthy of belief. The jury evidently did believe him and they were triers of the fact. We cannot say that their finding in favor of plaintiff is not based upon competent credible evidence.

Since the general finding in favor of plaintiff negatives fraud and must be sustained, and since the court instructed the jury that in the absence of fraud the defendant must be held to have accepted the plaintiff's offer, the argument that the jury intended to give the plaintiff only a liberal allowance for its services and disbursements in procuring an abstract and nothing for commission fails. The jury could not properly ignore the terms of a valid contract between the parties. How the mistake in the verdict occurred we do not know and it is idle to speculate upon the matter. But since there was no conflict in the evidence upon the subject of damages, placing the cost of the abstract at $21, the court properly corrected the amount thereof to conform to the proof. *Schweitzer v. Connor,* 57 Wis. 177, 14 N. W. 922; *Schweickhart v. Stuewe,* 75 Wis. 157 (43 N. W. 722) and cases cited on page 160.

By the Court.—Judgment affirmed.

CUSICK, Appellant, vs. WORTHINGTON PUMP & MACHINERY CORPORATION, Respondent.

May 29—June 25, 1919.

Corporations: Sale of real property: Brokers: Compensation for services: Ability and willingness of party procured to perform: Authority of local manager.

1. In an action to recover commissions for the sale of real estate, where it was shown that B., from whom plaintiff received his instructions to sell, was merely taking care of the property for the defendant corporation, but was not an officer thereof and had no authority to sell except to place the property in the hands of agents other than plaintiff, plaintiff is not entitled to commissions.
2. Where there is no evidence showing that the parties with whom plaintiff negotiated were ever willing or able to close a deal with defendant on any terms, plaintiff is not entitled to commissions.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to recover commissions on sale of real estate. The plaintiff in June, 1914, was assessor of the city of West Allis. At a meeting of the board of review of that city held in June, 1914, one J. D. Bird, the local manager of the *Worthington Pump & Machinery Corporation,* a foreign corporation, appeared before the board of review and objected to the assessment placed upon the plant of the Fred M. Prescott Steam Pump Company, then controlled by the receivers of the International Machinery Company, also a foreign corporation. Mr. Bird there stated that the company would sell the property for $75,000. Plaintiff then told him that he could sell the property for that amount, whereupon Mr. Bird, as claimed by the plaintiff, authorized the plaintiff to go ahead and sell the property at that figure and stated that he would pay him the regular commission for so doing. Plaintiff had some negotiations with a Mr. Hedgin. Mr. Hedgin, how-

ever, died in the fall of 1915 and the negotiations fell through. In April, 1916, the plaintiff interviewed Mr. Bird with reference to a sale to Harper and Squier. In a conversation with Mr. Bird the plaintiff informed him that Harper and Squier wished to lease the plant with an option to purchase. Mr. Bird informed him that the owners were desirous of disposing of the property. Squier and Harper proposed that they and their associates form a corporation, the names of the other associates having never been disclosed to Mr. Bird. About three weeks later and in the forepart of May the plaintiff informed Bird that his clients were endeavoring to raise the necessary money. Plaintiff claims that Bird from time to time assured him that in the event that other purchasers turned up he would be given an opportunity to pay down sufficient money to hold the plant. Mr. Harper died in August, 1916, and Mr. Fritz then came into the negotiations. The price named by the plaintiff to his customers was $120,000, with a suggestion that a cash offer of $100,000 would take the property. Negotiations continued, but the intending purchasers did nothing definite. In January, 1917, there appeared in a newspaper an advertisement in which it was stated that one Greene had the exclusive sale of the property. There was a meeting at the Prescott plant, of Squier, Fritz, and the plaintiff, brought about by the advertisement. In February, 1917, one Thompson, a capitalist, purchased the property for $76,000 and resold it on a land contract to Mr. Fritz and his associates for $86,000, receiving $10,000 in stock of the company making the purchase.

Mr. Bird was local manager of the Power Mining & Machinery Company. The defendant corporation was organized apparently to take over the property of the International Company and the Power Mining & Machinery Company. The plant of the Fred M. Prescott Company was owned by the International Machinery Company in June, 1914. The

receivers at that time had no representative in Wisconsin. The receivers placed the property in the hands of Bird to look after and protect, for which purpose a watchman was employed. On December 30, 1913, the Power Mining & Machinery Company, in a letter addressed to Bird, advised him that they would sell the property, that the asking price was $225,000, and that they wished the sale made on a cash basis. Pursuant to that letter the property was placed in the hands of one F. W. Rogers in June, 1914. Rogers left the state during 1915 and he placed the property in the hands of Mr. Shenners. The Rogers agency continued until July, 1915. In that month Bird was instructed by his superiors to withdraw the property from the market, as they proposed to employ the plant in the manufacture of munitions. Bird testified that he appeared before the board of review on his own motion. He denied the contract with the plaintiff, and in November, 1916, Nathaniel Greene was given the exclusive agency for the sale of the property. At the close of plaintiff's case the defendant moved for a nonsuit, which was granted, and from a judgment dismissing the action the plaintiff appeals.

Joseph E. Tierney of Milwaukee, for the appellant.

For the respondent there was a brief by *Bottum, Bottum, Hudnall & Lecher*, and oral argument by *F. L. McNamara*, all of Milwaukee.

ROSENBERRY, J. Plaintiff claims that under the doctrine laid down in *Garrick T. Co. v. Gimbel Brothers*, 158 Wis. 649, 149 N. W. 385, the agency of Bird to authorize him to make sale of the property is sufficiently proven.

It is to be noted that Mr. Bird was not an officer of the defendant company; that he was not in possession of the property as manager, but for the sole and specific purpose of preserving the same; that no express authority is shown for him to appear before the board of review or to make any disposi-

tion of the property other than that of placing it in the hands of the agent, Rogers, and later in the hands of Nathaniel Greene, as appears from the statement of facts. There is no evidence that Mr. Bird had any authority to enter into the arrangement by virtue of which the plaintiff claims the defendant became liable. There was no evidence that Bird, to the knowledge of the plaintiff, had ever pretended to deal with reference to this property. In the case relied upon Greenwald was a vice-president and the responsible executive head of the defendant company in this state. The act which he did was one of a class which his predecessor with the same powers had repeatedly done, to the knowledge of the plaintiff in that case. No reasonable man would conclude that a superintendent of a manufacturing plant, as such, had authority to sell and dispose of the property of his employer. The cases are not similar in any material aspect. There is no evidence in this case which would sustain a verdict finding that Bird was the authorized agent of the defendant for the sale of the property.

There is no evidence that Squier and Fritz were willing and able to buy. Thompson was induced to purchase the property and to resell it to Squier and Fritz and their associates at an advance of $10,000. There is no evidence that the parties with whom the plaintiff was negotiating were ever ready or able to close a deal with the defendant on any terms.

By the Court.—Judgment affirmed.

RUNDLE-SPENCE MANUFACTURING COMPANY, Respondent, vs. BADGER-PACKARD MACHINERY COMPANY, Appellant.

May 29—June 25, 1919.

Frauds, statute of: Landlord and tenant: Holding under void lease: Tenancy from year to year.

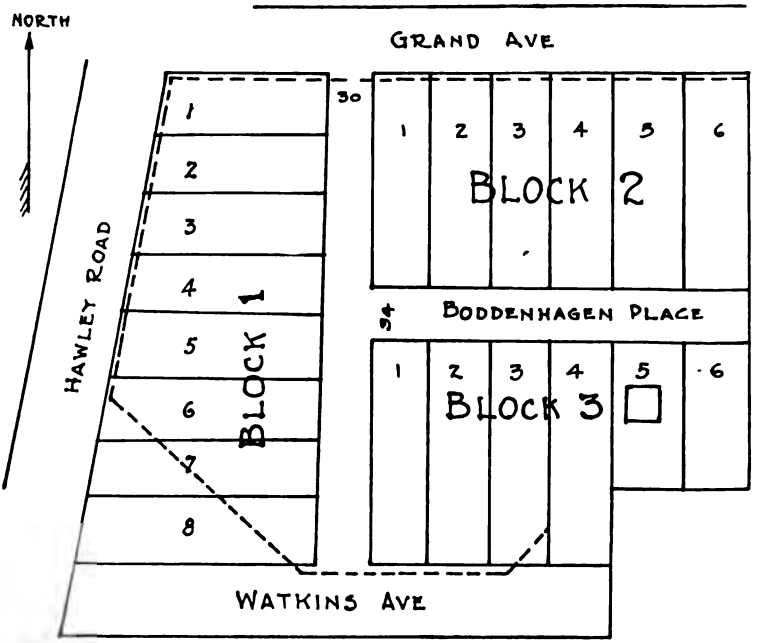
Although an oral agreement under which defendant was to occupy substantially the entire basement of plaintiff's building, a portion of which was occupied under a prior parol agreement at a monthly rental, was void under sec. 2302, Stats., being for a term of about seven years at an annual rental, yet, where defendant occupied the entire basement under the later agreement and paid the agreed rental for over a year, a tenancy from year to year was created under sec. 2187, and defendant could not by notice terminate such tenancy until the expiration of the year.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

By a written lease in May, 1914, the defendant became a tenant of the first floor of plaintiff's building in Milwaukee for a term of eight years. At about the same time, by a parol agreement, the defendant also occupied a portion of the basement of the same building at a monthly rental of $35. In April, 1915, the defendant desiring more basement space, another parol agreement was made by which plaintiff was to have substantially the entire basement for a term ending at the expiration of the lease for the first floor in 1922 and at an annual rental of $650, payable monthly. The defendant occupied the entire basement and paid such rental monthly until August 1, 1916. On July 1, 1916, the defendant gave plaintiff notice that defendant desired to give up possession of the basement on August 1st and terminate such lease. Plaintiff refused to recognize such claim of right and maintained that the continuing in possession after the year ending April 1, 1916, created a tenancy from year to year and that it could not be terminated, except by consent, at any such interme-

not owned by the plaintiffs and who in fact erected and maintained the fence in question. The defendants *Bernhardt et al.* filed a cross-complaint against the *Boddenhagens,* claiming to recover $5,000 of them in case the fence was adjudged to be removed, on the ground that the value of the premises for use as a baseball park and athletic field would thereby be practically destroyed. The court adjudged that the fence must be removed from the ends of the streets and also adjudged that because, by the removal of the fence, the cross-complainants have lost the use of the premises for baseball and athletic purposes, they are entitled to recover $750 damages and costs from the defendants *Boddenhagen,* and from this latter judgment the *Boddenhagens* appeal.

The facts will be more easily understood by referring to the accompanying plat of *Boddenhagen's* subdivision.



PLAINTIFFS' PROPERTY. LOTS 4-5 AND 6, BLOCK 3
DOTTED LINE IS THE LINE OF FENCE IN QUESTION

The greatest length of the subdivision east and west is about 430 feet, and north and south 375 feet. The plat was recorded June 16, 1908, and in August, 1914, the *Boddenhagens* sold and deeded to the plaintiffs lots 4, 5, and 6 in block 3, who soon thereafter built a house thereon in which they were living in May, 1915. No streets were marked out upon the ground and there was nothing to indicate that it was platted ground. In May, 1915, the defendants and cross-complainants *Bernhardt et al.* negotiated with the *Boddenhagens* for a five-year lease of the field for use as a base-ball park and field for other athletic sports and amusements conducted for profit. They had no actual knowledge that the field had been platted. Before making the lease they went on the premises with *Boddenhagen's* authorized agent, who assured them that *Boddenhagen* could and would lease the entire premises to them. There was a board fence along the entire east side of the premises. *Boddenhagen's* agent told them they could build a tight board fence so as to inclose all but the southwest corner of the premises; that such fence could begin at the northeast corner, run west to Hawley road, thence southwest along the east side of Hawley road to a point about halfway across lot 6 in block 1, thence southeasterly across lots 6, 7, and 8, and continuing to the south end of the high board fence on the east. Relying on these representations the cross-complainants made a verbal contract to lease the premises for five years, paying therefor as rental the taxes assessed on the premises not exceeding $100 a year. They immediately took possession and commenced to erect their fence and a small grandstand. The fence was begun at the northeast corner of the premises, and when Watkins avenue was reached *Boddenhagen* directed that the course be changed so as to run nearly east along the north line of Watkins avenue to a point near the middle of lot 3, block 3, and thence northeast to the west line of lot 4. The fence is indicated with substantial correctness by the dotted line on the plat. There was no fence around Kremsreiter's

premises. The complainants claim that *Boddenhagen* told them that they needn't mind Kremsreiter and could fence him right in. A written lease was prepared and signed by the parties May 27th, and in the lease the premises are described as "*Boddenhagen's* subdivision, whole of block 2, lots 1, 2, 3, 4, 5, 6, 7, and part of rear of lot 8 in block 1, lots 1, 2, and 3 in block 3, in the county of Milwaukee." The lease was for five years, with the option to the lessees to remain in possession on the same terms for another five years. The grounds were to be used for athletics, baseball, and sports. The lessees were to build a fence "completely around" the ground leased, and a grandstand, the same to become the property of the lessors at the end of the lease; and it was provided that the lessees should have the right to let space on the fence, both inside and outside, for display advertising. The lessees began to use the premises for baseball games immediately, and at once began to have trouble with Kremsreiter because balls were batted on to his premises and it was necessary to trespass on lot 4 to reclaim them. However, the premises were used for minor baseball league games (principally on Sunday) during the most of the season of 1915, but were not used for Sunday games in 1916. This action was commenced May 25, 1916. The lessees elected to retain the premises, pay the rent, and recover their damages by their cross-complaint in this action.

O. W. Bow of Milwaukee, for the appellants.

For the respondents there was a brief by *Raymond J. Cannon,* attorney, and *Glicksman, Gold & Corrigan,* of counsel, all of Milwaukee, and oral argument by *W. L. Gold.*

WINSLOW, C. J. The appellants' first claim is that because Kremsreiter was in possession of his house on lot 5 when the lease was made and because the lease described the property as certain lots in a subdivision, the respondent lessees thereby had notice of the fact that Kremsreiter must have a right of access somewhere across the rented property

and also of the fact that there were or might be streets upon the property which could not be closed.

We cannot agree with this contention. Of course, as against Kremsreiter, his actual possession of his lots put the lessees upon inquiry as to his rights and they were charged with notice thereof, but as to the *Boddenhagens* the situation is very different. It is established in this court that where, as in the present case, a vendor points out the boundaries of land which he is selling, the vendee is entitled to rely thereon, and the vendor must point them out correctly under penalty of responding in damages to a vendee who is ignorant of the real facts. *Castenholz v. Heller,* 82 Wis. 30, 51 N. W. 432; *Gunther v. Ullrich,* 82 Wis. 222, 52 N. W. 88.

The appellants' second claim is that no legal damages are shown. The damages are measured by the difference between the rental value of the premises as represented and the rental value as they actually were. *Pewaukee M. Co. v. Howitt,* 86 Wis. 270, 277, 56 N. W. 784. The trial judge found that by reason of the removal of the fences the lessees lost the use of the property for baseball and athletic purposes for two and one-half years and that the loss amounted to $400 per year, or $1,000 in all. Deducting from this sum the rental which they would have to pay for that time (viz. $250), the total loss in value of the leasehold would be $750.

We are unable to agree with this conclusion. In the first place it appears affirmatively that the only revenues received by the lessees were from the rental of the sign privileges and the rental for baseball games. Whether the grounds were suitable and could be profitably used for football and skating purposes were matters of considerable doubt under the evidence, but in any event no attempt was made to use them for those purposes and the amounts that might be realized in such uses were purely speculative and conjectural and would furnish no basis for the assessment of damages. There is no evidence to show that the rental value of the sign privilege is any less since the removal of the fence than it was

before. So, in considering the question of the difference in rental value of the premises, the only substantial element that can be considered is the loss of their use for baseball purposes. But the difficulty here is that the testimony is quite conclusive to the effect that the use of the premises for baseball was given up because of two entirely different considerations, namely, the constant and serious difficulties with Kremsreiter, and the fact that the diamond had to be laid out so that the batter faced northeast, making the field a "sun-field" in the afternoon and undesirable on that account. On this subject *Bernhardt,* the principal lessee, testified: "There was a lot of trouble arose at the time, this man owned the grounds out there, we could not play there, he was belly-aching we were running into his cabbage patch." *Deisinger,* another lessee, testified: "Kremsreiter wouldn't allow us to get our ball; they would talk to him and he wouldn't listen to us, and we had trouble with him; that is the reason we didn't finish the season." *Neuens,* another lessee, testified that on account of the sun-field and the threats of Kremsreiter, who would not give their balls back, "We thought the best thing would be not to play any more ball in that lot." *Mischler,* the other lessee, says: "The only reason I know why they discontinued using the park in 1915 was they got into trouble with this man about his garden and things of that sort, and on account of the condition of the field and the disbanding of this [the Blatz] team."

But even if the removal of the fence were shown to be the thing which destroyed the usefulness of the park for baseball purposes, another consideration makes it impossible to base any damages upon that fact. The only baseball games which brought in any considerable revenue were Sunday games. The use of the park for Sunday games was unquestionably illegal under sec. 4595, Stats., which prohibits any one from being present at "any dancing or public diversion, show or entertainment" and from taking part in "any sport, game, or play" on Sunday. Profits made on Sundays from a

violation of the Sunday law cannot form any legal basis for the estimate of damages. *Raynor v. Valentin Blatz B. Co.* 100 Wis. 414, 76 N. W. 343.

It is true there is evidence of the renting of the park to a local league for baseball on Saturday afternoons in 1916 for $50, but it appears that after a few games this league quit on account of the trouble with Kremsreiter.

We have been unable to discover in the evidence any solid foundation for the estimate of any legal damages, hence there must be a reversal of the judgment to that extent.

By the Court.—That part of the judgment appealed from is reversed, with costs in favor of the defendants *Boddenhagen* against the cross-complainants, and the action is remanded with directions to dismiss the cross-complaint on the merits.

HARLOW, Respondent, vs. KINGSTON and wife, Appellants.

May 29—June 25, 1919.

Deeds: Cancellation: Grounds for relief: Previous intoxication of grantor: Inadequacy of consideration.

1. One who, as a result of intoxication, has been deprived of his memory or judgment or rendered incapable of comprehending or appreciating the nature and effect of his act (in this case the execution of a deed), will be granted relief in equity against the consequences thereof, if the other party thereby obtained an unconscionable bargain.
2. Where the grantor in a deed conveying his interest in certain land for an inadequate consideration had been grossly intoxicated for some time immediately prior to its execution, so that his thirst for liquor dominated his mind and rendered it abnormal and incapable of appreciating the effect of his act, equity will cancel the deed although the grantor was sober at the time of executing it.
3. The grantor having conveyed his interest in the property, which the court found to be worth $1,388, for $200, the consideration was so inadequate as to entitle him to relief against the deed, although the interest conveyed was subject to the dower and homestead rights of his mother, who was then sixty-six years old.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was brought by plaintiff to cancel and annul a deed made by him to defendants, by which he conveyed to defendants his interest in certain property.

Timothy Harlow, father of the plaintiff, died intestate in September, 1910. At the time of his death he was possessed of eighty acres of land in the town of Rantoul, Calumet county, on which he resided, also eighty acres of land in Oconto county. He was survived by his widow and nine children, of whom plaintiff is one. By the final order of settlement made by the county court in the estate of Timothy Harlow, plaintiff was assigned a one-ninth interest in and to the real estate of Timothy Harlow, subject to the dower and homestead rights of the widow and the lien of two mortgages, and there was also assigned to him an undivided one-tenth interest in and to certain farm personal property of the value of $68.21.

At the death of Timothy Harlow he left two mortgage liens against the real estate in Calumet county, one for $800 and one for $1,000. His widow gave a renewal mortgage upon the lands of which he died seized, signed by herself, for the principal sum of $1,900, on which, on July 31, 1916, there was $72 accrued interest. The widow, Mary Harlow, claims that the $800 and the $1,000 mortgage are still a lien upon this land. The widow was sixty-six years of age when this action was prosecuted.

On July 31, 1916, plaintiff deeded his interest in the estate to defendant *Kingston* for $200. He claims in this action that at the time of the execution of the deed, as a result of intoxication, he was mentally incompetent and insane from the excessive use of liquor and was incapable of understanding or executing the deed; that defendant *Kingston* knew this, and that *Kingston* obtained the deed from him through fraud, duress, and undue influence. The answer of the defendant admits the making of the deed, but denies drunken-

ness or incapacity of the plaintiff, and denies all fraud or undue influence on the part of the defendant *Kingston.*

The case was tried before the court without a jury. The court, among its findings of fact and conclusions of law, determined the following:

(1) That for some ten days before the deed was executed plaintiff had been on a prolonged spree and had been grossly intoxicated, although at the time of the making of the deed he was sober; that he had been out of money for several days and had exhausted his credit; that immediately upon obtaining the purchase price he started on another drunken debauch which lasted ten days or two weeks thereafter.

(2) That while the plaintiff was not appreciably under the influence of liquor at the time of the sale, nevertheless, by reason of his debauch, he had such a consuming thirst for liquor and his mind was so dominated thereby that it did not act normally and he did not appreciate what he was doing.

(3) That the defendant did not solicit the purchase and conveyance, but was solicited by the plaintiff; that the purchase price was $195.

(4) That the defendant was not guilty of fraud, artifice, or deceit.

(5) That the price paid was grossly inadequate and the transaction unconscionable.

(6) That before action was brought plaintiff offered defendant $200 and interest and demanded a rescission of the contract and tendered defendant a deed to execute, all of which defendant refused, even though the plaintiff finally offered him $250 to reconvey.

(7) That the value of plaintiff's interest in his father's estate is $1,388, subject to the homestead and dower rights of his mother.

As a conclusion of law the court held that, the money having been offered to defendant by plaintiff and refused by defendant, the sum might be deposited with the clerk of the circuit court for the use and benefit of defendant; that the

deed be declared null and void; and that the judgment of the court stand as a reconveyance of all property covered by the deed.

Judgment was entered accordingly and the $200, with interest, paid to the circuit court clerk for the use and benefit of defendant. The defendant appealed from this judgment.

For the appellants the cause was submitted on the brief of *T. L. Doyle* of Fond du Lac.

L. P. Fox of Chilton, for the respondent.

SIEBECKER, J. This is an action in equity for the rescission of a deed on the ground that plaintiff at the time he executed the deed was legally incapacitated to make it. The incapacity of plaintiff is found by the circuit court to have been due to a prolonged debauch from intoxication immediately preceding the day of the sale of his property to the defendant, and that by reason thereof his mind at the time of the sale was so dominated by a consuming thirst for liquor that it did not act normally and that he did not appreciate what he was doing. The significance the court gave to this finding in the light of the evidence presented by the record is shown by the relief awarding rescission of the deed and directing return to the defendant of the consideration he paid plaintiff. Relief in actions of this nature is based on the ground that

"Both minds must meet in such a transaction; and if one is so weak, unsound, and diseased that the party is incapable of understanding the nature and quality of the act to be performed or its consequences, he is incompetent to assent to the terms and conditions of the instrument, whether that state of his mind was produced by mental or physical disease and whether it resulted from ordinary sickness or from accident or from debauchery or from habitual and protracted intemperance." *Johnson v. Harmon*, 4 Otto (94 U. S.) 371.

This principle was relied upon in *Burnham v. Burnham*, 119 Wis. 509, 97 N. W. 176. If the effect of the intoxication deprives the party of memory or judgment or makes

him incapable of comprehending or appreciating the nature and effect of the act, then equity, upon application of such party, grants relief. *Fagan v. Wiley,* 49 Oreg. 480, 90 Pac. 910; *Drefahl v. Security Sav. Bank,* 132 Iowa, 563, 107 N. W. 179; *J. I. Case T. M. Co. v. Meyers,* 78 Neb. 685, 111 N. W. 602; *Swan v. Talbot,* 152 Cal. 142, 94 Pac. 238; *Moetzel v. Koch,* 122 Iowa, 196, 97 N. W. 1079.

When an unconscionable bargain has resulted from conditions due to intoxication and debauchery, equity considers the transaction an imposition on the incompetent party and awards relief. 14 Cyc. 1105. The findings of the trial court present a state of facts showing plaintiff was at the time of this transaction an incompetent as the result of gross intoxication and debauchery, and that the consideration defendant paid plaintiff for the property conveyed was grossly inadequate. Such a state of facts presents a case for the relief granted by the circuit court, if the evidence sustains the findings.

The defendant contends that the evidence fails to show that plaintiff was intoxicated at the time he deeded his property to defendant on July 31, 1916. The trial court is explicit in its finding that at the time the transfer was executed plaintiff was not appreciably intoxicated, but that by reason of his gross intoxication for a long period immediately before this day a consuming thirst for liquor so dominated his mind as to render it abnormal and that he was unable to appreciate what he was doing. This in nature and effect shows that plaintiff's intoxication produced such abnormal condition of mind as to render him incapable of comprehending and appreciating the effect of his act. We have examined the evidence and find that it sustains the trial court's findings on this issue. The court also found that the consideration of $200 defendant paid plaintiff for his one-ninth interest in his father's estate was grossly inadequate in the light of the fact that plaintiff's interest in the land at the time was worth $1,388. It is manifest that such disparity between value

and consideration paid shows a grossly inadequate consideration, and the facts support the inference that defendant at the time of purchase fully realized that he was obtaining such a bargain. He acquainted himself with the nature of the property, and no doubt understood what was its actual value before the deal was consummated. But, it is claimed, the value found by the court is not sustained by the evidence. True, plaintiff's interest is subject to his mother's dower and homestead rights, the mother being sixty-six years of age at the time of the trial. On the record it cannot be said that the mortgage given by the mother is a lien on the interest acquired by the defendant. Allowing for the mother's interest, the value of the one-ninth interest in the land is far in excess of the consideration of $200 paid by the defendant, and the transaction is an unconscionable bargain by which plaintiff was deprived of his property.

We are unable to say that the court's findings on this point are against the clear preponderance of the evidence. The record shows that plaintiff offered to repay the defendant $200 with interest before action was commenced. It is considered that the record sustains the judgment awarded by the trial court.

By the Court.—The judgment appealed from is affirmed.

MUELLER, Appellant, vs. BROTZ and others, Respondents.

May 29—June 25, 1919.

Eminent domain: Property subject to: Villages: Highways through buildings: Injunction: Violation: Effect of dissolution and motion to review: Duration of restraining order.

1. Notwithstanding sec. 1347, Stats., extends the provisions of ch. 52, relating to highways and bridges in towns, to all parts of the state except where there are inconsistent provisions applicable to particular counties, towns, cities, or villages, the provisions of sec. 1263 (in said ch. 52), prohibiting the laying out of highways through buildings, etc., do not apply to villages.

2. After condemnation proceedings to widen a village street, a circuit court commissioner issued an order restraining defendants from entering upon plaintiff's premises, and later this order was dissolved by the commissioner, whose action was sustained by the circuit court. *Held*, that the fact that a request for a stay of proceedings was incorporated in a notice of motion to have the dissolving order reviewed by the circuit court did not render the defendants guilty of contempt in entering upon plaintiff's premises, there being no injunctional order in force.
3. A restraining order pending an application for an injunction ceases to be operative at the expiration of the date fixed by the order.

APPEAL from a judgment and an order of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff against the defendant village and its board of trustees to restrain them from entering upon or taking possession of certain premises owned, used, and occupied by the plaintiff as his homestead.

The complaint, among other things, alleges that the plaintiff is the owner of said premises, namely, lot No. 1, in block No. 1, of the original plat of Riverside, and that there is a two-story frame building upon said lot of the value of $2,600 and a barn of the value of $75, and a garden in a state of cultivation which is planted to raspberry bushes and garden truck, and a well and pump, which well and pump are of the value of $75, also valuable trees.

The complaint further alleges that the defendants, without legal authority and acting under a pretended resolution, are attempting to condemn and appropriate plaintiff's premises for the purpose of widening Kohler street in said village, and that defendants have no legal right to condemn, invade, appropriate, or use plaintiff's premises, but that they threaten so to do, to the exclusion of the plaintiff, and will do so unless restrained, and that such acts will result in irreparable injury to plaintiff, and that plaintiff has no adequate remedy at law.

The defendants justify their entry under proceedings duly

taken for widening Kohler street under sub. (11), sec. 893, and secs. 894*a* to 903, Stats.

It is without dispute that the foregoing statutes were complied with in the condemnation proceedings and that such proceedings were regular and the defendants entitled to take possession unless sec. 1263, Stats., applies to a condemnation proceeding to take land for street purposes in a village.

After the condemnation proceedings and on July 12, 1917, a court commissioner issued a temporary restraining order ordering the defendants to show cause before him on July 18, 1917, why a temporary injunction should not issue. After hearing on said order and on July 25, 1917, the commissioner issued an order dissolving the temporary restraining order of July 12th, and denied a temporary injunction. On August 2d plaintiff served notice of motion to have said court commissioner's order of July 25th reviewed and set aside by the circuit court for Sheboygan county on September 18, 1917, and further gave notice that it would then apply to the circuit court for a temporary injunction, and asked that all proceedings on defendants' part be meantime stayed.

Defendants entered upon and took possession of the premises in question September 4, 1917. Thereafter and on September 22, 1917, plaintiff obtained an order from the circuit court requiring defendants to show cause why they should not be punished as for contempt, which order was brought to a hearing October 8, 1917, and the court on the hearing dismissed said contempt proceedings and affirmed the court commissioner's order of July 25, 1917.

Judgment was entered in the court below dismissing the plaintiff's complaint and also dismissing the contempt proceedings, from which judgment and order this appeal was taken.

The cause was submitted for the appellant on the brief of *O. A. Bassuener* and *F. Vollrath,* both of Sheboygan, and for the respondents on that of *Detling & Detling* and *Francis Williams,* all of Sheboygan.

KERWIN, J. 1. Two contentions are made upon this appeal: (1) Whether sec. 1263, Stats., applies to the opening of streets in villages; and (2) Whether the contempt proceedings should have been dismissed.

Sec. 1263 by its express language does not apply to villages and cities, but only to towns. This court has never expressly passed upon the question. It seems quite clear from the record and concessions of counsel that if sec. 1263 controls the case the judgment should have been rendered in favor of the appellant, but if not, the judgment of the circuit court should be affirmed, since it seems to be conceded that the proceedings taken by the defendant village under secs. 895 to 902 were regular in all respects. Sec. 1263 is found in ch. 52, which relates to highways and bridges in towns, while secs. 895 to 902, relating to condemnation of lands, authorize cities and villages to condemn lands. Sec. 925—154 provides the method for condemning lands by cities of the first class for street and other purposes. Sec. 895 authorizes villages to condemn land for street and other purposes. Counsel for appellant, however, rely upon sec. 1347, Stats., which is found in ch. 52, and which provides that the provisions of ch. 52 shall extend to all parts of the state except where special provisions inconsistent therewith have been or shall be made by law in relation to particular counties, towns, cities, or villages. Sec. 922 provides that no law contravening the provisions of this chapter shall be considered as repealing or modifying the same unless such purposes are expressly set forth in such law. Sec. 1347 has been before this court in *Paine L. Co. v. Oshkosh,* 89 Wis. 449, 61 N. W. 1108, and it was held that

"It was not the purpose of sec. 1347 to make all the provisions of ch. 52 applicable to a city, irrespective of their character, although not in conflict with any provision of its charter. The adaptability of the provision and the plain indication of the language used must be regarded in construing those provisions, regard being had to the subject matter to be affected."

Counsel for appellant rely upon *Smart v. Hart,* 75 Wis. 471, 44 N. W. 514; *Flanders v. Wood,* 24 Wis. 572; and *Seymour v. State,* 19 Wis. 240. In *Smart v. Hart, supra,* the commissioners of the village of Waukesha were made defendants because the village and town were co-operating, part of the highway being in the town and part in the village. But the plaintiff's property was in the town, so that case, as well as *Seymour v. State* and *Flanders v. Wood, supra,* are clearly distinguishable from the case at bar.

We are satisfied that sec. 1263 is not applicable to the instant case. This section prohibits the laying out of a highway through or upon any orchard or garden or any building or fixture used for the purpose of trade or manufacture, or through or upon any building, fixture, yard, or inclosure used for educational or charitable purposes, or through or upon any other building or fixture where the value of said building or fixture exceeds $75, or through or upon the yard or inclosure necessary to the use or enjoyment thereof without the consent of the owner, or through any cemetery without the consent of the trustees or other officers having the management or control thereof. If this statute were applicable to cities and villages it would be practically impossible to construct streets in villages or cities.

2. It appears from the record that after the condemnation proceedings were had and payment tendered the defendants took possession of the land pending the contempt proceedings referred to in the statement of facts. Notwithstanding the fact that the court commissioner to whom application for injunction was made denied it, and the court upon a rehearing of the matter before it sustained the order of the court commissioner, it is claimed, as we understand the argument, that because a stay pending the hearing of the contempt proceedings was asked for the defendants were not warranted in entering and taking possession before the final disposition of the contempt proceedings. On this point, however, it is sufficient to say, as appears from the record, that at the time

the entry was made there was no injunctional order in force prohibiting the entry upon the premises, therefore there could have been no violation of an injunctional order. In fact no injunctional order was at any time issued. Even a mere restraining order pending an application for an injunction ceases to be operative at the expiration of the date fixed by the terms of the order. *State ex rel. Downing v. Green,* 48 Neb. 327, 67 N. W. 162; *State ex rel. Plattsmouth T. Co. v. Baker,* 62 Neb. 840, 88 N. W. 124.

We are convinced that the court below was right and that the judgment and order appealed from should be affirmed.

By the Court.—Judgment and order are affirmed.

MEINERT and others, Respondents, vs. ROEGLIN and another, Appellants, and others, Respondents.

May 31—June 25, 1919.

Wills: Creation of life estate: Suspension of power of alienation: Duration.

1. A will devising land to a son to have and to hold the same to himself and his heirs forever, with a proviso that he shall not sell, but that the land shall go to his heirs after his decease, gives him a life estate only, with remainder to his heirs.
2. Such a devise does not offend the rule against perpetuities, since alienation is suspended only during the life of one person in being.

APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action to construe a will. In February, 1879, J. Friedrich Meinert executed his will which contained this devise:

"I hereby give, devise, and bequeath unto my son Syabe Friedrich Meinert the following real estate [describing a seventy-two acre tract], together with all the farm utensils and stock of horses, cattle, etc., on the place, to have and to hold the same to himself and his heirs forever, with the proviso that my son Syabe Friedrich shall not sell the land herein

bequeathed to him, but that the land shall go to his heirs after his decease."

The testator died in 1884.

At the time the will was executed the testator had two sons, Peter and Syabe, and three married daughters. He had previously given Peter forty acres of land and also his son John, since deceased, forty acres, and prior to his death had given each of his daughters $500, and one had given a receipt in full for her inheritance. Syabe was thirty-seven years old in 1879, never married, and lived with his father on the land devised, and continued to live there till his death in 1917. He devised the land to one *Caroline Roeglin,* who lived on the farm with him and his father in 1879. The trial court held that Syabe had only a life estate in the land and that upon his death it went to his heirs and not to the devisee in his will. From a judgment entered accordingly the devisee, *Caroline Roeglin,* and *Charles C. Wirth,* executor of the will of Syabe, appealed.

For the appellants there were briefs by *William F. Schanen* and *Albert W. Grady* of Port Washington, attorneys, and *James D. Shaw* of Milwaukee, of counsel; and the cause was argued orally by *Mr. Shaw.*

For the respondents there was a brief by *Carbys & Kenney,* attorneys, and *Kleist, Harriman & Knappe,* attorneys for *William Meinert* and *Johanna Brunholz,* all of Milwaukee; and the cause was argued orally by *J. O. Carbys* and *John C. Kleist.*

Charles J. Kunny of Port Washington, guardian *ad litem* for the minor respondents.

VINJE, J. Tested by the construction given similar wills by this court, especially in the cases of *Knox v. Knox,* 59 Wis. 172, 18 N. W. 155; *Hovely v. Herrick,* 152 Wis. 11, 139 N. W. 384; and *Will of Olson,* 165 Wis. 409, 162 N. W. 429, the circuit court, in view of the language of the will and the circumstances surrounding the testator at the time of its

execution, correctly held that Syabe took a life estate only with remainder to his heirs.

Such a devise does not offend the rule against perpetuities, since alienation is suspended only during the life of one person in being. Sec. 2039, Stats.

By the Court.—Judgment affirmed.

FRANKFORT GENERAL INSURANCE COMPANY, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

May 31—June 25, 1919.

Liability insurance: Subrogation of insurer: Contract of indemnity: Contribution: Limitation of liability: Joint tortfeasors: Judgment: Admissibility in evidence: Conclusiveness.

1. One of two joint tortfeasors, against whom a judgment has been rendered, upon being sued for contribution by the plaintiff, which as liability insurer of the other had paid the entire judgment, cannot limit the amount of recovery by showing that its co-tortfeasor had refused to join in a settlement, offered by the person against whom the tort was committed, for a less amount than the judgment, no right of contribution then existing and joint tortfeasors having no right to relieve themselves of liability as have co-obligors in a contract or judgment under sec. 4204, Stats.
2. The judgment recovered by the injured person against the defendant and another as joint tortfeasors, while not conclusive upon the defendant, was properly offered in evidence by the insurer in its action for contribution, and, there being no evidence tending to impeach it, the findings and undisputed evidence sustain the judgment in this case.
3. Where the policy of insurance was an indemnity policy containing an express subrogation clause, and the insurer paid the whole of a judgment rendered against the assured and the defendant jointly, the insurer had the same right against the defendant that the assured would have had upon discharging the judgment, although the right of contribution did not arise until the payment was made.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action for contribution. One Ertel recovered judgment for $4,000 and costs against the Milwaukee–Western Fuel Company and the defendant in a personal injury action. In that action it was determined that the Milwaukee–Western Fuel Company and the defendant were guilty of coincident independent acts of negligence resulting in injury to said Ertel, and Ertel had judgment against both companies. The judgment was paid by the plaintiff, the insurer of the Milwaukee–Western Fuel Company, and plaintiff commenced this action for contribution. Plaintiff had judgment in the trial court, from which judgment the defendant appeals.

For the appellant there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

For the respondent there was a brief by *Doe, Ballhorn & Doe,* attorneys, and *Frank M. Hoyt,* of counsel, all of Milwaukee, and oral argument by *Mr. Hoyt* and *Mr. Joseph B. Doe.*

ROSENBERRY, J. The defendant claims that it is not liable, and bases its claim upon three propositions:

(1) The defendant asserts that it acquired an equitable defense limiting the amount which it might be required to contribute; that such equitable defense arose out of the fact that the Milwaukee–Western Fuel Company refused before the trial of the Ertel action to join with the defendant in the settlement of Ertel's claim for the sum of $2,400, the defendant having secured Ertel's offer to accept that sum and at the same time agreed to contribute four sevenths of the amount of the settlement if the Milwaukee–Western Fuel Company would contribute the remaining three sevenths.

(2) Plaintiff failed to prove the facts requisite to a recovery in the court below.

(3) Plaintiff as an insurer has no right to maintain the action.

In determining whether or not the defendant may limit its liability in the manner set forth in its first grounds of defense, recourse must be had to fundamental principles. We cannot state the principles underlying the right to contribution better than they are stated in 13 Corp. Jur. 821:

"The doctrine of contribution rests on the principle that, when the parties stand *in æquali jure,* the law requires equality, which is equity, and one of them shall not be obliged to bear a common burden in ease of the rest. It is founded on principles of equity and natural justice and does not arise from contract. In other words, the doctrine of contribution is not founded on contract, but comes from the application of principles of equity to the condition in which the parties are found in consequence of some of them, as between themselves, having done more than their share in performing a common obligation." See *Boutin v. Etsell,* 110 Wis. 276, 278, 85 N. W. 964.

The right of contribution in this case does not arise out of the accident to Ertel. It does not arise until a joint tortfeasor has done more than his share in performing a common obligation. The defendant had not paid or discharged any part of the liability which grew out of the accident, therefore it had no right of contribution as to any one. It is clear, therefore, that the right of contribution, which does not come into existence until one of the joint tortfeasors has discharged more than his fair share of the common liability, cannot be destroyed or even modified by the antecedent conduct of the other joint tortfeasor in refusing to assume a liability not conclusively established. If joint tortfeasors desire to be relieved of liability where the right of contribution exists, legislative authority to that end should be secured, as has been done in the case of co-obligors under a contract or judgment, in sec. 4204, Stats.

It is further claimed that the judgment in the Ertel case is not *res adjudicata* under the decision in *Bakula v. Schwab,* 167 Wis. 546, 168 N. W. 378. Under the well established

principles of evidence the plaintiff had a right to offer in evidence the judgment recovered in the Ertel case. Jones, Evidence (2d ed.) § 593. While the defendant here was not concluded by that judgment, no evidence was offered which tended in any way to impeach it. Therefore the findings and the undisputed evidence in this case sustain the judgment.

The plaintiff here took no assignment of the right of contribution held by the Milwaukee–Western Fuel Company against the defendant, but relies entirely upon its right of subrogation under the policy, which contained a clause providing that in the event of loss the insurance company should be subrogated to all claims and rights of the Milwaukee–Western Fuel Company in respect to such loss against any person. The defendant claims that no right of subrogation existed under the rule laid down in *Marshall–Jackson Co. v. Jeffery,* 167 Wis. 63, 166 N. W. 647. Plaintiff claims that the rule laid down in *Marshall–Jackson Co. v. Jeffery* and *Gatzweiler v. Milwaukee E. R. & L. Co.* 136 Wis. 34, 116 N. W. 633, does not apply, because in those cases it was held that the policies of insurance were in the nature of accident insurance, and, not being expressly made contracts of indemnity, the insurer is not by payment subrogated to the rights of the assured; whereas in the present case the policy is by its terms an indemnity contract and contains an express subrogation clause.

While it is true that the Milwaukee–Western Fuel Company had no right of action against the defendant until it had discharged the judgment and there was therefore prior to payment no cause of action in favor of the Milwaukee–Western Fuel Company against the defendant to which the plaintiff might be subrogated, we see no reason why the doctrine of subrogation should not be extended so as to cover a case such as this. Having under its contract discharged the liability of the Milwaukee–Western Fuel Company, which as between it and the defendant amounted to one half of the Ertel judgment, and having under its contract been obliged

to discharge the other half of the judgment for which the defendant might be equitably liable for the reason that as between it and the insured it was bound to discharge the whole of the liability of the Milwaukee–Western Fuel Company, there is no reason why it should not have the same right against the defendant that the Fuel Company would have had had it discharged the judgment, although the right of contribution did not arise until the payment was made. By the payment of the judgment in this case the liability of all parties, both as to the original judgment creditor, Ertel, and as between each other, will be fully settled and discharged. We find no adjudicated case which has extended the right of subrogation so far; however, no reason appears to us why it should not be.

By the Court.—Judgment affirmed.

ESTATE OF MARGARET FLANAGAN, Respondent, vs. ESTATE OF JOHN FLANAGAN, Appellant.

May 31—June 25, 1919.

Executors and administrators: Claims against decedents: Witnesses: Transactions with deceased: Conversations with third persons: Satisfaction of mortgage: Parol evidence: Limitation of actions: Findings of jury: Review on appeal: Harmless error: Clerical mistake.

1. In an action by a wife against her husband's estate, issues as to whether plaintiff's father gave her a note and mortgage executed by her husband, whether she loaned him money, and whether he had paid her, are, considering the relationship of the parties, peculiarly questions of fact on which the jury's findings, if sustained by the evidence, will not be disturbed.
2. The satisfaction of a mortgage, like an ordinary receipt, is open to explanation by parol evidence, and can thus be impeached.
3. Declarations of a wife in her husband's presence to the effect that her father had given her a note and mortgage executed by her husband, were not transactions or communications with a deceased person within the meaning of the statutes, and were properly admitted in evidence in an action on the note and mortgage by the wife against the estate of the husband.

4. A daughter interested in her mother's estate can testify in an action by that estate against her father's estate to conversations between her mother and father in which she did not participate.
5. Where the mortgagee gave the note and mortgage before maturity to his daughter, the wife of the mortgagor, she was not subrogated to her father's rights, but became her husband's creditor as much as though she had purchased the mortgage, and hence the statute of limitations would not become operative between them.
6. A clerical error of the court in mistaking the name of claimant's brother in the special verdict is *held* not to have misled the jury, and was properly corrected by the court after verdict.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is from a judgment affirming an allowance made by the county court of Fond du Lac county.

This action was brought by Margaret Flanagan, Sr., to secure payment of claims against her husband's estate. Recovery is sought on a note of $3,000, with interest, and the sum of $1,000, with interest, which she claims to have loaned to her husband, John Flanagan, deceased. Margaret Flanagan, Sr., died after filing the claim and before the trial of this action. At the time of the trial in circuit court, Margaret Flanagan, Jr., was administratrix of the estate of John Flanagan, deceased, and executrix of the last will and testament of Margaret Flanagan, Sr.

It is the claim of the plaintiff that John Flanagan borrowed from Patrick Hoey, father of Margaret Flanagan, Sr., the sum of $3,000 on February 21, 1878, and that to evidence the obligation John Flanagan made, executed, and delivered to Patrick Hoey his promissory note for this amount, and that to secure payment of the note John Flanagan delivered to Patrick Hoey a mortgage covering certain real estate in the town of Osceola, in the county of Fond du Lac. This mortgage was recorded on or about the 6th day of March, 1878, in the register of deeds' office in Fond du Lac county. It is alleged that prior to March 8, 1880, Pat-

rick Hoey, father of Margaret Flanagan, Sr., made a gift of this note and mortgage to her and that no part of the principal and no interest was paid. No written assignment of this note and mortgage was given by Hoey to his daughter, Margaret Flanagan, Sr. She claims that while the note and mortgage were owned by her, her husband, John Flanagan, procured the satisfaction of the lien of said mortgage upon the lands described therein, and that this satisfaction was recorded in the register of deeds' office in Fond du Lac county about March 8, 1880. It is alleged that the note and mortgages were taken and held by John Flanagan, deceased, and were either lost or destroyed, but that he held them in trust for Margaret, his wife, and was truly indebted to her therefor. For a second claim against the husband's estate plaintiff asks for the sum of $1,000 which it is claimed was given to Margaret Flanagan, Sr., by her brother, Thomas Hoey, nineteen years previous to this action, and which it is alleged she loaned to John Flanagan and which remains unpaid.

Answer to the claim was made by John McGalloway, guardian *ad litem* for Margaret Flanagan, Jr., who sets up as a bar to the claim the statute of limitations.

The case was tried before the court and a jury. By a special verdict the jury found that Patrick Hoey, in March, 1880, gave to Margaret Flanagan, Sr., the $3,000 note and mortgage he held against John Flanagan; that the amount of the note was never paid by John Flanagan to Margaret Flanagan; that John Flanagan received from Margaret Flanagan the $1,000 received by her from the estate of her brother, Thomas Hoey; that it was agreed between the Flanagans that the sum should be repaid to the wife by the husband; that this sum was never repaid to the wife.

Judgment was entered allowing a claim of $6,171.66 and costs. This is an appeal from such judgment.

For the appellant there was a brief by *Reilly & O'Brien* of Fond du Lac, and oral argument by *J. E. O'Brien.*

L. J. Fellenz of Fond du Lac, for the respondent.

SIEBECKER, J. It is urged that the evidence adduced does not sustain the following findings of the jury: (1) that Patrick Hoey, father of Margaret Flanagan, Sr., made her a gift of the $3,000 note executed by John Flanagan in his lifetime to evidence a loan made to him by Patrick Hoey in February, 1878, and which was secured by a mortgage on the farm owned by John Flanagan at the time the note was given; (2) that John Flanagan borrowed from his wife, Margaret, the $1,000 she inherited from her brother, Thomas Hoey; and (3) that John Flanagan agreed to repay this sum to his wife, and did not repay her before his death.

The evidence on these issues is too voluminous to be restated here. The record contains the evidence of a number of witnesses to the effect that John Flanagan admitted his indebtedness to his wife for the amount of the note and the $1,000 she received from her brother, Thomas, and it is clearly to the effect that he did not repay any part of these sums to his wife. It is contended that the satisfaction of the mortgage executed by Hoey shows payment of the $3,000 note. The facts and circumstances testified to by the witness Gaffney, and other evidence adduced, concerning the giving and execution of this satisfaction, present a state of facts regarding the intent and purpose of the parties respecting the execution and delivery of the satisfaction and the continued existence of the debt thereafter which raised an issue that called for trial thereof by a jury. The record discloses that there was a controversy of long standing regarding this loan and the gift thereof by Hoey to his daughter, Margaret Flanagan, Sr. This issue, in the light of the testimony and the relationship of the parties, is, in its nature, peculiarly within the field for determination by a jury. An attentive reading and study of the testimony on the question of the gift of the note by Hoey to his daughter and of the loan of the $1,000 Margaret Flanagan, Sr., inherited from her brother, Thomas, has led us to the conclusion that the evidence amply sustains the findings of the jury on these

questions and hence cannot be disturbed on appeal by this court. It is urged that Gaffney's testimony of the conversation between the husband and wife regarding the making of the gift of the note by Hoey to his daughter and his testimony regarding the giving of the satisfaction is not competent evidence on these issues and was improperly received.

The satisfaction in its nature operated as a receipt of payment and, like an ordinary receipt, is open to explanation by parol evidence and can thus be impeached. It is considered that the trial court properly held that the verdict of the jury was warranted by the evidence on this point. The appellant assails the ruling of the trial court admitting part of the evidence of Margaret Flanagan, Sr., and Margaret Flanagan, Jr., over objections to its competency, upon the ground that such evidence relates to transactions and communications by witness with the deceased persons under and through whom they claim their rights and interest in the money in question. The statements of Margaret, Sr., do not include communications with her husband prohibited by the statute. They were mere declarations in his presence of the fact that she was the holder of his note, which her father had given her, and are not transactions with her husband. As the circuit court held, the issue here involves no controversy between Margaret, Sr., and her father, and hence her statements in her husband's presence concerning the gift are not incompetent in this action against her husband, as tending to show that she owned this note under gift from her father. Such conversations are not transactions with a deceased person within the meaning of the statutes. So much of her deposition as the circuit court admitted in evidence was proper.

The exception urged to the reception of part of the testimony of Margaret, Jr., upon the same grounds, namely, that they pertain to and cover communications and transactions with her deceased father and mother, is not well taken because she took no part in nor influenced the conversations

referred to, though they took place within her hearing. The conversations offered in which she participated were properly excluded. We find no error in admitting this class of testimony, though some questions are on the border line between competent and incompetent evidence under the statute. It is considered that no error was committed by the admission of evidence over appellant's objections.

It is contended that the court erred in ruling that the statutes of limitation did not bar the claim of Margaret, Sr., on the note against her husband. This is urged on the ground that under the facts she became subrogated to the rights of the father respecting the loan and its payment, and, since the statute of limitations would bar recovery on the note in the hands of her father, the debt is likewise barred in her hands. We cannot accede to this contention as correct. When the note was transferred by gift from Hoey to his daughter, Margaret, she became as absolutely the creditor under the note as if she purchased it, and she therefore stood in the relationship of her husband's creditor in the law before the note was due, and she held it as a claim against him the same as if he had borrowed the money from her. It is conceded that the statute of limitations does not apply if the case is within the rule declared in *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681, and prior cases. The contention is that the rule of *Charmley v. Charmley*, 125 Wis. 297, 103 N. W. 1106, governs this case; it being there held that where the wife became subrogated to a claim held by a third party against her husband after the statute of limitations had commenced to run against the claim, the statute continues to run on the claim against the wife, and recovery will be barred thereon between husband and wife at the end of the limitation period. See, also, *Enwright v. Griffith, ante*, p. 284, 172 N. W. 156. The instant case is not of this class, but is like the case of *Brader v. Brader, supra*, in that the wife became the owner of the husband's debt before it was due and hence the statutes of limitation did not become operative between them. From this it follows that the statute of limita-

tions does not bar a recovery on the note nor for the $1,000 loan.

We are satisfied that the mere clerical error of the court in mistaking the name of claimant's brother as Patrick instead of Thomas in the verdict did not mislead the jury, and the court properly corrected it after verdict. The exceptions urged against the court's instructions have been examined and we find no error therein. The instructions embody a correct statement of the law applicable to the case.

By the Court.—The judgment is affirmed.

MITCHELL STREET STATE BANK, Respondent, vs. SCHAEFER, Appellant.

May 31—June 25, 1919.

Banks and banking: Acts of cashier: Individual interest: Authority: Receiving bonds as collateral.

1. One who borrowed money from a bank on his notes in order to purchase bonds of a corporation in which he was a stockholder is entitled to rely on statements of the cashier (who was also a stockholder and trustee of the corporation) that the bank would sell the bonds and apply the proceeds in payment of the notes, for which the bonds would be held as collateral, and is not responsible for the conversion of the bonds by the cashier, the acts and declarations of the cashier being those of the bank.
2. The cashier had full authority to receive such bonds as collateral on behalf of the bank for notes given to it, where as stockholder and trustee his only interest in the matter was to get par value for the bonds of his corporation. This having been accomplished, he had no further interest, and his acts bind the bank.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action upon two promissory notes of $5,000 each given by the defendant to the plaintiff bank. The defendant by answer and counterclaim alleges that he deposited with the

bank as collateral security for the notes $10,000 worth of bonds executed by the Wisconsin Mausoleum Company, and that the bank had converted the same. The plaintiff's reply denied the allegations of the counterclaim.

The facts were these: In April, 1913, one Edgerton was vice-president, cashier, and active manager of the plaintiff bank; he was also a stockholder in the Wisconsin Mausoleum Company, a corporation then engaged in constructing a community mausoleum in Milwaukee. The defendant *Schaefer* was also a stockholder in the Mausoleum Company and treasurer thereof. The Mausoleum Company, in order to raise funds for its building, put out a bond issue of $40,000 in 1912, secured by a trust deed, and sold the bonds to Edgerton at ninety-three per cent. of their par value on his agreement to pay for them by furnishing the moneys necessary to complete the building. These bonds were guaranteed by defendant *Schaefer* and two others. They were to be paid by the sale of crypts, the sum of $150 being agreed to be turned over to Edgerton on the sale of each crypt. The defendant was the contractor who furnished the marble and granite work for the mausoleum, and a considerable part of the moneys realized from the bonds was to be used to pay amounts due him. In April, 1913, Edgerton had disposed of $30,000 worth, par value, of the bonds to the plaintiff bank, but more cash was needed and Edgerton called *Schaefer* to the bank and told him that more money was needed. *Schaefer* states that in this interview Edgerton said in substance, "We are short of money; the bank don't want to carry any more of these bonds on account of objection that might be made by the bank examiner; we want you to give a note of $5,000 to the bank and we will sell you $5,000 of these bonds and you leave them with the bank as collateral security for your note, and if the bank can sell the bonds it will do so and redeem the note, and it will only be a short time before they will all be sold." *Schaefer* further testified that he then signed the note; that Edgerton went into another room and

got the bonds, and put the bonds and note together in an envelope and said, "These will have to be left with the bank." The bank then credited the mausoleum account with the $5,000 and the money was drawn out to pay bills for labor and materials used in the building by checks signed by *Schaefer* as treasurer. Some time later Edgerton called *Schaefer* to the bank again and told him more money was needed, and *Schaefer* executed a second note for $5,000 and put up another $5,000 worth of bonds as collateral under practically the same circumstances as stated with regard to the first $5,000. Edgerton was not produced as a witness and *Schaefer's* testimony as to the two transactions is undisputed. The notes were renewed from time to time. Interest appears to have been paid by the Mausoleum Company, but when the notes in suit became due in March, 1915, the defendant refused to renew them again and asked Edgerton to sell the bonds, and Edgerton after some talk stated that he had taken the bonds to Waukesha and borrowed $5,000 on them. It is undisputed that the bonds were and are worth par. They never were returned nor accounted for, so far as the evidence shows, and the position of the bank in this action is that they never came into possession of the bank either actually or constructively, but were retained and used by Edgerton personally. The trial court directed a verdict for the defendant for the amount of the notes and interest, and from judgment on the verdict the defendant appealed.

The cause was submitted for the appellant on the brief of *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and for the respondent on that of *Flanders, Fawsett & Smart* of Milwaukee.

WINSLOW, C. J. It seems plain to us that a verdict for the defendant should have been directed in this case. A man acting in good faith is entitled to deal with the cashier of a bank in the usual course of banking business in entire confidence that the acts and statements of the cashier in the course

of such dealing are in legal effect the acts and statements of the bank.

The defendant here was dealing with the bank acting through its cashier and manager. He proposed to borrow $5,000 from the bank on his note, loan the amount to a business corporation in which he was interested (receiving from the cashier, who was also a trustee of the corporation, $5,000 worth of its trust-deed bonds for his loan), and to deposit the bonds with the bank as collateral security for his note, with the understanding that the bank should sell the bonds as soon as possible and apply the proceeds to the payment of the note.

There was nothing in this outside of the usual course of the banking business; such transactions are occurring every day, and we think the business public would be greatly surprised to know that in such a transaction the acts and declarations of the cashier were not binding on the bank. Were it otherwise there would be no safety in dealing with any banking official or officials short of the board of directors in regular meeting assembled.

When, in the present case, the cashier, after producing the bonds which he held as trustee up to that time, accepted the defendant's note to the bank and informed him that the bonds would remain with the bank as collateral security for the note, the transaction was closed, the bonds had in legal effect passed into the possession of the bank as completely as if they had been placed in the vault, and the defendant was not obliged to see that the cashier did not thereafter convert them to his own use.

It is argued that the defendant could not treat the statements of Edgerton as the statements of the bank because he knew that he (Edgerton) had a personal interest in the transaction apart from his interest or duty as an officer of the bank; but it is only when the statement is made in the agent's own interest and against the interest of his principal, to the knowledge of the party with whom the agent is dealing, that this exception to the general rule applies.

There was no such case here. Edgerton's personal interest in the transaction as stockholder and trustee was simply to get par value for the company's bonds. That having been accomplished, he had no further legitimate personal interest in the matter, and hence no interest contrary to the interests of the bank or adverse to the hypothecation of the bonds with the bank to secure the defendant's note. As cashier he had full authority to receive the bonds as collateral on behalf of the bank, and he assumed to exercise that authority and thereby bound the bank. The defendant was entitled to rely upon his acts as the acts of the bank, and cannot be held responsible for his subsequent breach of duty to the bank in converting the bonds to his own use. *First Nat. Bank v. Sing Sing G. M. Co.* 120 App. Div. 542, 104 N. Y. Supp. 1040, affirmed 194 N. Y. 580.

This view of the case renders it unnecessary to treat any other questions. It being undisputed that the bonds have been converted and that they were worth par, the counterclaim offsets the amount due on the notes.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment dismissing the complaint.

SMITH and another, Respondents, vs. RAILROAD COMMISSION OF WISCONSIN and another, Appellants.

May 31—June 25, 1919.

Public utilities: Street railways: Order fixing rates: Validity: Emergency: Review.

1. In an action to set aside an order of the railroad commission fixing rates for street-car fares on the lines of the defendant street railway company in La Crosse, it is *held* that no "emergency" existed for making the order under sec. 1797—28, Stats., but that the order, though containing the word "emergency," was valid as a general rate order under sec. 1797—12.
2. To justify the trial court in disturbing an order of the commission made in due course, it must be established by clear and satisfactory evidence that the order was unlawful or unreasonable.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This appeal was from a judgment entered on the 31st day of March, 1919, setting aside an order of the *Railroad Commission of Wisconsin* entered on the 12th day of September, 1918, fixing rates for street-car fares on the lines of defendant *Wisconsin Railway, Light & Power Company* in the city of *La Crosse,* Wisconsin.

The *Wisconsin Railway, Light & Power Company,* hereinafter in this opinion referred to as the *Company,* filed with the *Railroad Commission* on July 9, 1918, its petition setting forth that since June 30, 1913, the petitioner had furnished street railway service in the city of *La Crosse* without a reasonable return on its investment, and during the year 1917 and thereafter the cost of furnishing such service had greatly increased. It is alleged in the petition that the *Company* had been compelled to meet an unusual and unexpected rise in the cost of material and labor, which resulted in a decided decrease of net revenue and a large and increasing deficit in the operation of such railway. It is further alleged that to meet such increases in cost of operation it was necessary that rates be permanently increased and also a temporary emergency rate be made effective immediately. Relief was asked for in the form of permanent increase in rates and also an emergency temporary rate.

The *Commission* on July 10, 1918, made an order for hearing, giving ten days' notice of such hearing, and jurisdiction was obtained by the *Commission* to give general relief under sec. 1797—12, Stats., as well as emergency relief under sec. 1797—28. The matter was heard July 23, 1918, pursuant to notice and testimony presented by all parties. The *Commission* took the matter under advisement August 12, 1918, and filed its decision and order September 12, 1918.

Suit was brought to set aside the order of the *Commission.* Upon the trial the record before the *Commission* was put in evidence, witnesses sworn, and testimony taken. All the

proceedings had in the circuit court were then returned by the court to the *Commission* pursuant to the statute and the matter again considered by the *Commission*. The *Commission* on January 21, 1919, reported to the court and discussed the questions under consideration, and held that the *Company* was entitled to relief and that the order was lawful and reasonable and should stand. The court took the matter under advisement, and on March 31, 1919, signed and filed findings and conclusions vacating and setting aside the order of September 12, 1918, and declared such order to be unlawful on the ground that no emergency existed under sec. 1797—28 for making the order, and judgment was based upon the ground that no emergency existed.

The *Company* filed requests for findings of fact and conclusions of law and requested a finding that the rates were insufficient and the return inadequate, and that it would be an injustice to set aside the order of the *Commission*, which requests were refused.

The *Company* operates a street railway at *La Crosse*, a street railway and electric light and power plant at Winona, Minnesota, a hydraulic electric power plant at Hatfield, and transmission lines connecting such plant with the Winona and La Crosse properties, and also an auxiliary steam plant in the city of Winona, and owns a reserve or stand-by plant in the city of *La Crosse*, the transmission system being tied in with the transmission system of the Wisconsin–Minnesota Light & Power Company at Bluff Siding and with the same company's light and power plant at *La Crosse*, so that an interchange of current is effected between the combined properties of the two companies. The steam plant at *La Crosse* was the primary source of operation when the *Company* was in the hands of former owners and before the hydraulic electric plant at Hatfield was available. A portion of the power used by the *Company* is purchased from the Wisconsin–Minnesota Light & Power Company, and so far as used at *La Crosse* is brought from Bluff Siding over the transmission line owned by the *Company*.

The engineers of the *Commission* made a valuation of the street railway property as of June 30, 1911, giving the total cost of reproduction new as $423,402, and additions from the date of such valuation to December 31, 1917, making the total valuation at said date $615,510. It was conceded on the hearing that the *Company* was entitled to a return of seven and one-half per cent. upon its investment, the *Company* contending that it was entitled to such percentage of return upon a valuation in excess of $700,000, the city contending that the stand-by plant at *La Crosse* was of no value and should not be considered for rate-making purposes, claiming that the valuation should be placed at $529,782, and for the purpose of an emergency case the city's expert claimed that the valuation should be $500,000. The *Commission* in its original decision allowed a valuation of $545,510, thus eliminating the value of the stand-by plant at *La Crosse*. The *Commission's* expert, however, testified that the stand-by plant should not be eliminated, and after the resubmission to the *Commission* it reported back to the court conceding that the value of the stand-by plant should have been included.

The *Company's* exhibits before the *Commission* show the earnings of the railway company for a number of years. These accounts treat the railway system separately from the balance of the *Company's* operation and charge such system with power at a fixed price. These figures are shown in exhibits introduced.

According to the *Commission's* decision the deficit from a seven and one-half per cent. return for the year ending June 31, 1916, was $230.58; for the year ending June 30, 1917, $13,804.26; for the half year ending December 31, 1917, $8,236.67; and for the half year ending June 30, 1918, $10,111.95. The deficit, according to the *Company's* figures, for the month of October, 1918, was $5,185.65, and for the month of November, 1918, $4,355.12. The deficit

for the five-months period beginning July 1, 1918, as based upon the *Commission's* figures, was $24,823.86.

It is undisputed that the *Company* has never declared or paid a dividend to its stockholders. Evidence was introduced showing the increase in wages and cost of material entering into every phase of operation. The evidence shows that the wages of trainmen were largely increased between July 1 and October 1, 1918.

For the appellant *Railroad Commission* there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

For the appellant *Wisconsin Railway, Light & Power Company* there were briefs by *George H. Gordon* of La Crosse and *Miller, Mack & Fairchild* of Milwaukee, and oral argument by *Edwin S. Mack.*

For the respondents there was a brief by *Charles H. Schweizer* and *J. E. Higbee* of La Crosse, counsel, and *O. J. Swennes,* city attorney, and oral argument by *Mr. Schweizer* and *Mr. Swennes.*

KERWIN, J. The court below disposed of the case upon the ground that no emergency existed for making the order under sec. 1797—28, Stats., which provides:

"The commission shall have power, when deemed by it necessary to prevent injury to the business or interests of the people or railroads of this state in consequence of interstate rate wars, or in case of any other emergency to be judged of by the commission, to temporarily alter, amend, or, with the consent of the railroad company concerned, suspend any existing passenger rates, freight rates, schedules and orders on any railroad or part of railroad in this state. Such rates so made by the commission shall apply on one or more of the railroads in this state or any portion thereof as may be directed by the commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the commission."

Five members of this court are of opinion that upon the

facts disclosed by the record no emergency existed within the meaning of the statute for making the order under sec. 1797—28, while two members hold that such an emergency did exist.

Starting with the proposition that no emergency existed, therefore the order was not valid as an emergency order under sec. 1797—28, the question arises whether the order was valid as a general rate order under sec. 1797—12.

The order upon its face is in substance the same as a general rate order made under sec. 1797—12, except it contains the word "emergency." The *Commission* seems to have understood that the application was not only for emergency relief but for a general order as well. In its report it is said:

"The petition seems to have asked both emergency relief and the treatment of the case as in due course. We concluded in our opinion of September 12, 1918, that a case demanding emergency relief was presented, a conclusion which has been emphasized by operating results. On the other hand, we believe that it was desirable from a public standpoint to retain complete jurisdiction over the street railway rates in *La Crosse*, treating the present rates as emergency rates, and defer a final order fixing street-car fares in that city until a return of something like normal conditions."

An order under sec. 1797—12 may be in form substantially the same as an order under sec. 1797—28 with the exception of the word "emergency."

The order and report of the *Commission* seem to indicate that the *Commission* intended to give relief for a situation not necessarily permanent. The order provided that the *Company* be "authorized to suspend the schedule of rates at present in effect on its *La Crosse* street railway system and substitute therefor" the schedule prescribed in the order.

The petition was broad enough to cover emergency rates and general rates. Ten days' notice of hearing was given and the matter heard in accordance with the provisions of sec. 1797—12. All parties interested were represented and testimony taken at great length. The *Commission* had the

matter under advisement for about a month. While the order was designated an emergency order, it is quite plain from the notice given and all the proceedings had, as well as the form of the order itself, that the *Commission* intended to cover a situation which, while it might not be of long duration, still the order would be sufficient and proper as an order in due course. The proceeding for review of the order of the *Commission* is statutory, and unless it be established that the order is either unlawful or unreasonable it cannot be disturbed.

In the instant case the petition was broad enough to cover a proceeding for either emergency relief or relief in due course under sec. 1797—12. It is clear from the record that the *Commission* had jurisdiction to proceed, and that all parties interested were before the court and a full and exhaustive hearing had, and the hearing covered all issues in the matter, and the procedure was the same as in other cases where a general rate hearing is had before the *Commission.* There was ample credible evidence in the record to show that the income was not sufficient to pay a reasonable return on the investment after allowing three per cent. depreciation. It is unnecessary to go into a discussion of the facts and figures in the record, which are very voluminous and which appear to have been carefully considered by the *Commission.*

Treating the order as an order in due course under sec. 1797—12, it cannot be said that it was either unlawful or unreasonable. While, as before observed, the majority of the court is of opinion that an emergency, within the meaning of sec. 1797—28, did not exist, the whole court is agreed that the order is valid as an order in due course under sec. 1797—12. Under the well established rule, in order to justify the court below in disturbing the order it must be established by clear and satisfactory evidence that the order complained of was unlawful or unreasonable, and it has been held by this court that the words "clear and satisfactory evidence" used in the statute must be applied in the same sense

as they are in describing the proof necessary to establish fraud or mistake in a written instrument. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905. It is equally plain from the record that the order cannot be held unlawful.

The court below disposed of the case on the ground that no emergency existed under the statute and did not consider the question whether the order was good as an order in due course under sec. 1797—12, and the question arises whether the case should be remanded to the court below with instructions to pass upon the question. The court is of opinion that this is unnecessary, since the whole matter was considered and fully litigated on all questions, and upon the record the order of the *Commission* should have been affirmed by the court below as an order in due course.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to enter judgment affirming the order of the *Railroad Commission.*

TODOROFF, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

June 2—June 25, 1919.

Railroads: Accident at crossing: Sufficiency of evidence: Gross negligence: Appeal: Harmless error: Instructions.

1. In an action for the killing of the driver of a popcorn wagon at a railroad crossing, evidence as to the engineer's acts or failure to act after seeing that deceased was oblivious to danger is *held* not sufficient to take to the jury the issue of gross negligence.
2. Where the undisputed facts showed that deceased was guilty of more than slight negligence, error in instructions as to the care required of him in approaching the crossing was not prejudicial.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

Plaintiff's husband was killed by one of defendant's trains in the city of Cudahy, Wisconsin, September 2, 1917.

The accident occurred on Van Norman avenue, which runs east and west and is crossed by defendant's double-track main line at an angle. East of and parallel with defendant's tracks are those of the Milwaukee Electric Railway & Light Company's interurban line, and the centers of the two rights of way are eighty-two feet apart. Next east of the street-car line and also parallel with it is Lynn avenue. Defendant's train approached from the south on the westerly of its two tracks at a speed of at least sixty miles per hour. The track was straight for about 1,938 feet from this crossing, and an approaching train could be seen from the middle of the track at this crossing for about 2,475 feet. The view was unobstructed to the southwest along the tracks to a traveler on Van Norman avenue after reaching the east line of defendant's right of way. The Cudahy depot was on the east side of defendant's tracks and about 1,130 feet south of Van Norman avenue.

Deceased was driving a glass-inclosed popcorn wagon with one horse. He came along Lynn avenue, then turned to the west on Van Norman avenue, crossing the street-car tracks, and just as his wagon was leaving defendant's west tracks it was struck by defendant's locomotive and he was killed.

The complaint set forth two causes of action: one for negligent violations of statutory regulations, and the other for gross negligence based upon the unlawful speed. The court below directed a verdict for defendant upon plaintiff's claim of gross negligence and submitted a special verdict upon the other, by which the jury found in substance as follows:

(1) The excessive speed of more than twelve miles per hour was a proximate cause of the death; (2) the engine bell was rung continuously from the time the train was within twenty rods south of the crossing until the time of the collision; . . . (4) the collision was before one hour after sunset; . . . (6) a failure to maintain a headlight of sufficient

power to enable the engineer to plainly discern the deceased at a distance of not less than 800 feet was not a proximate cause of the death; (7) the deceased was guilty of more than a slight want of ordinary care contributing to his death in driving towards and upon the crossing; (8) the damages assessed at $5,250.

Upon the several and usual motions after verdict the court ordered judgment for the defendant, and from such plaintiff has appealed.

For the appellant there was a brief by *Kleist, Harriman & Knappe* of Milwaukee, and oral argument by *Edwin W. Knappe.*

R. N. Van Doren of Milwaukee, for the respondent.

ESCHWEILER, J. The plaintiff contends on this appeal that there was an issue of fact which should have been submitted to the jury upon the cause of action as to the alleged gross negligence of defendant; and secondly, that there were errors in the charge of the court to the jury upon the cause of action that was submitted in the special verdict.

There were but two witnesses who testified to having seen the deceased just prior to the collision, one defendant's engineer and the other plaintiff's witness Troka. The latter testified that he and a companion crossed the defendant's track on Van Norman avenue going easterly, and passed on the south side of the deceased just as he was driving westerly at the center of the street-car tracks. At the time Troka crossed the railroad track there was no train in sight. As he passed the popcorn wagon the deceased was sitting in it facing west, and turned towards the south and looked at him and his companion. The wagon was surrounded with glass so that there was nothing to interfere with the deceased's vision in all directions. The deceased was resting his head on his left arm with his elbow on the window sill, holding the lines with his right hand and driving very slowly. Troka then proceeded easterly over the street railway tracks and turned to the south

on Lynn avenue. Shortly thereafter he heard the whistle and the sound caused by the engineer applying the brake.

The engineer testified that just as he was about at the Cudahy depot he saw the deceased driving slowly off from the right of way of the street-car company and immediately blew the whistle, and then, it appearing that the deceased was apparently paying no attention to the approaching train, applied his emergency brakes when he was at a distance which he estimated at eight to nine hundred feet south of the crossing, but owing to the high rate of speed at which the train was going it could not be stopped until it had passed to a point about 1,000 feet north of the crossing. Only the rear wheels of the wagon were struck.

There is some apparent confusion in the testimony of Troka as well as in that of a witness Falkenthal, called by defendant, and who was riding on the train, as to the point at which the whistle was blown just prior to the train approaching the crossing, and it is mainly upon such testimony that plaintiff relies in urging that the case should have been submitted by the court to the jury on a question as to whether or not the conduct of the engineer, after he saw that the deceased was approaching the place of danger without any apparent recognition of the approaching train, might be considered as gross negligence.

An examination of the record in this case satisfies us that the apparent confusion with reference to the time prior to the collision when the whistle was blown arises from the fact that during the examination of the witnesses the fact that the whistle was blown twice was not always kept clearly presented. It is undisputed, however, that before the train was visible from the Van Norman avenue crossing a whistle was blown for the Cudahy depot and then another one at some point near the Cudahy depot, and both of these witnesses so testified.

The facts in this case justify the conclusion that the trial court necessarily reached in directing judgment for the de-

fendant on the cause of action for gross negligence that there were no facts presented which would warrant a jury in arriving at a determination that, after defendant's engineer saw the deceased approaching the crossing in apparent ignorance of his danger, there was any act or failure to act, in that instant in which he had to decide what to do or refrain from doing, that could be fairly said to meet the clearly defined rule as to the gross negligence recognized under our law. *Herrem v. Konz,* 165 Wis. 574, 577, 162 N. W. 654.

It is unnecessary to consider the question as to whether or not the charge of the court to the jury on the seventh question of the special verdict, as to the care exercised by the deceased in driving towards and upon the crossing, was in accord with what was said by this court upon the same statutes as are here involved and upon the facts as in that case presented of *Gordon v. Ill. Cent. R. Co.* 168 Wis. 244, 169 N. W. 570, for the reason that it must be said as a matter of law, upon the undisputed facts in this case, that there was more than a slight want of ordinary care contributing to the death involved in this case from the way in which the deceased did drive towards and upon this crossing. There was nothing that in any manner diverted his attention or lulled him into security or that prevented in any manner his looking towards the south after entering upon the defendant's right of way or from seeing the rapidly approaching train if he had so looked.

Proposed instructions, therefore, based upon what was said in former cases involving situations where there was, under the facts there, something to divert the attention or lull into security, could not be material in this case, and therefore error in refusing to give such proposed instructions or in the instructions given on this subject, if any such errors there are, could not be deemed prejudicial under the undisputed facts in this case.

By the Court.—Judgment affirmed.

CITY OF MILWAUKEE, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN and others, Respondents.

June 2—June 25, 1919.

Street railways: Consolidation: Urban and interurban lines.

Sub. 3, sec. 1775, and sec. 1862*a*, Stats., both having their origin in ch. 234, Laws 1891, though in terms granting power to consolidate "street railways," authorize consolidation of the urban lines of one company and the urban and interurban lines of another company, both organized to own and operate both kinds of business, the term "street railway" having for years before the enactment been used by the legislature to include both kinds of railways.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action was brought by the city of *Milwaukee* to secure a temporary injunction restraining the *Railroad Commission* from proceeding to determine the application of the *Milwaukee Electric Railway & Light Company* (hereinafter called the *Electric Company),* under secs. 1753—1 to 1753—22, inclusive, of the Statutes, for leave to issue $1,600,000 of common capital stock and deliver the same to the *Milwaukee Light, Heat & Traction Company* (hereinafter called the *Traction Company)* in part payment of the purchase price of the operating property of the last-named company.

The *Electric Company* was organized February 1, 1896, while the *Traction Company* was organized December 14, 1896. The *Electric Company* operates the street-car lines within the city of *Milwaukee* and the *Traction Company* operates or owns interurban lines outside the city connecting with the lines of the *Electric Company.* The plaintiff claims that the *Traction Company* has no franchise of its own in the city, but has used the lines of the *Electric Company.*

The two companies applied to the *Railroad Commission* for permission to consolidate, the *Electric Company* con-

templating the issuance of $1,600,000 common stock to be delivered to the *Traction Company* in part payment of the purchase price of all the operating property of that company. The city of *Milwaukee* objected to the jurisdiction of the *Railroad Commission* on the ground that the statutes do not permit a street-car company to purchase or consolidate with the *Traction Company,* an interurban company, which the city claims cannot be consolidated with a street-car company.

The two companies deny that this restriction exists, and allege that the corporate purposes of both companies include both the operation of urban and interurban railways. They also deny that the *Traction Company* has no franchise to operate interurban cars inside the city of *Milwaukee* and allege that lines formerly owned by the *Traction Company* have been included in the city of *Milwaukee* by the extension of the corporate limits; and that the two companies as operating concerns are, pursuant to orders of the *Railroad Commission,* operating electric railroads in the city of *Milwaukee* within the single-fare zone.

The trial court held that both companies were organized under the provisions of ch. 234, Laws 1891, and that this act conferred the power to consolidate both urban and interurban railways by purchase one of the other. The application for a temporary restraining order was denied. Plaintiff appeals from such order.

For the appellant there was a brief by *Clifton Williams,* city attorney, and *Charles W. Babcock,* assistant city attorney, and oral argument by *Mr. Babcock.*

For the respondent *Milwaukee Electric Railway & Light Company* there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee; and the cause was argued orally by *James D. Shaw* and by *E. E. Brossard,* assistant attorney general.

SIEBECKER, J. The facts show that both the *Electric* and *Traction Companies* are organized under the same statute of

this state and that both companies declare it is their purpose to conduct the business, among other things, of owning and operating electric street railways in the city and county of Milwaukee and elsewhere in the state. The scope of the articles of incorporation includes the owning and operating of such railways to and into any city, village, or town, and thence into or through any other city, village, or town. It is manifest that the powers and purposes of the two companies embrace the right of each company to own and operate any of the properties involved in this proceeding. But it is claimed that the statutes grant no power to consolidate the urban street railway properties of the *Electric Company* with the interurban properties of the *Traction Company*. As heretofore indicated, both companies are organized to own and operate both businesses and, in fact, the *Traction Company* is now owning and operating a part of the street railway business in the city of *Milwaukee,* and hence it is a street railway corporation which owns and operates a street and an interurban railway and properly combines the two enterprises, under the provisions of secs. 1862 and 1863, Stats., conferring the right to organize for that purpose pursuant to ch. 86, Stats. This right of the *Traction Company* was recognized in *Milwaukee L., H. & T. Co. v. M. N. R. Co.* 132 Wis. 313, 112 N. W. 663, and negatives the contention of the plaintiff that under the provisions of sub. 3, sec. 1775, and sec. 1862*a,* Stats., it was not contemplated to confer power on a street railway company to purchase and own the properties of another railway company conducting an interurban business. We think the circuit court correctly interpreted these sections and stated the grounds showing their application here:

"Both sections had their origin in ch. 234, Laws 1891. Long before this act was passed the legislature had granted 'any street railway company' the power 'to extend its railroad to any point or points within any town adjoining' the municipality in which the tracks of the street railway were located.

Sec. 2, ch. 313, Laws 1860. Later 'street railways' were given the power 'to extend from any point in one village or town to, into or through any other village or town . . . for the carriage of either passengers or freight.' Ch. 221, Laws 1880. The acts just cited show that the legislature has so used the term 'street railway' as to include both urban and interurban railways for thirty years before ch. 234 of the Laws of 1891 was enacted. It must be assumed that the legislature had this long-established meaning in mind when it used the phrase 'street railway' in ch. 234, Laws 1891."

We are of the opinion that the circuit court has ascertained the legislative intent and meaning of the provisions of sub. 3, sec. 1775, and sec. 1862*a*, and that the *Electric Company* has the power to acquire the property of the *Traction Company*, including the interurban lines, and that the plaintiff's application for an injunction was properly denied.

By the Court.—The order appealed from is affirmed.

SPERRY & HUTCHINSON COMPANY, Respondent, vs. WEIGLE, Appellant.

June 2—June 25, 1919.

Trading stamps: Construction of statute: Legislative intent: Method of redemption.

It is not a violation of the provisions of sec. 1747*m*, Stats. 1917 (prohibiting the use of trading stamps but allowing a dealer to issue slips or tickets bearing a stated cash value and redeemable only in cash and only by the person, firm, or corporation issuing them), where stamps complying with the statute in form and contents are sold by a trading stamp company to merchants and are redeemed by the company at its office with money furnished by the merchant or by the merchant himself at his place of business.

APPEAL from orders of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to restrain the defendant, as dairy and food commissioner of Wisconsin, from prosecuting Wisconsin mer-

chants under the trading stamp act (sec. 1747*m*, Stats. 1917) for permitting plaintiff to act as their redemption agent in the use of trading stamps bought from plaintiff and issued by them in their business. The circuit court made a temporary injunctional order and also entered an order denying defendant's motion for judgment on the pleadings and his motion to dissolve the temporary injunction. The defendant appealed from both orders.

For the appellant there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

For the respondent there were briefs by *Bottum, Bottum, Hudnall & Lecher* of Milwaukee, attorneys, and *Frank T. Wolcott* of New York and *Walter Drew* of Milwaukee, of counsel; and the cause was argued orally by *Mr. E. H. Bottum* and *Mr. Wolcott.*

VINJE, J. The plaintiff is licensed to do business in this state and sells trading stamps to merchants redeemable in cash. They are about the size of a postage stamp and bear upon their face the inscription "Sperry and Hutchinson. 10 Trading Stamp. New York City. 1-10 Mill," artistically arranged; and, apparently stamped or printed across this inscription appear these letters, figures, and words: "F. G. I. 194 Wis. 1918. Cash value 1⅔ mills." On the back of the stamp are plainly printed the words: "Cash value 1⅔ mills. Redeemable by party issuing." Plaintiff sells these stamps in large quantities to merchants, together with a book in which the stamps may be pasted for convenient keeping and which when filled has a cash value of $2. This book gives the location of the redeeming office, the one in evidence being Grand avenue and Fourth street, Milwaukee, Wisconsin. When the stamps are sold, the merchant deposits with plaintiff a sum of money sufficient to redeem the stamps, and if the money is not all used, owing to the fact that the merchant has made redemption in his own store, or

to the loss of stamps by customers or their failure to present them or otherwise, the surplus is refunded to the merchant. The pleadings show that thousands of these stamps are issued daily by many merchants and for sales ranging from ten cents upwards. They also allege at great length the advantages of a cash business and claim that redemption can successfully be made only by a large force of skilled experts, since some merchants use upwards of 40,000,000 stamps per year. The customer has the option of having the stamps redeemed by the merchant at his place of business or at the office of plaintiff. The question presented for adjudication is, Does this mode of redemption violate the provisions of sec. 1747*m*, Stats. 1917, which prohibits the use of trading stamps,

"except that any manufacturer, packer or dealer may issue any slip, ticket, or check with the sale of any goods, wares or merchandise, which slip, ticket or check shall bear upon its face a stated cash value and shall be redeemable only in cash for the full amount stated thereon, upon presentation in amounts aggregating twenty-five cents or over of redemption value, and only by the person, firm or corporation issuing the same."

It is admitted that the stamps in question comply with the statutory provisions so far as form and contents are concerned. It is also evident from the language of the statute that it contemplated the issuing of tickets or stamps of small value and that the same would have to be held till twenty-five cents in value were collected by one purchaser before redemption could be demanded. The only violation of the statute claimed is that the merchant does not redeem as the statute provides when redemption is made by plaintiff. In other words, Does the statute permit a merchant to contract with another to do the manual work of redemption, the merchant furnishing the money and being financially responsible to the customer for the redemption?

It is a familiar principle of law that one may lawfully do

by an agent that which he may lawfully do himself. It follows, therefore, that the transactions here involved do not run counter to the letter of the statute. But it is argued that they violate its spirit, purpose, and intent in that they permit a corporation engaged in selling stamps also to redeem them, thus making one financially interested in the trading-stamp business the agent of redemption. In order to determine this question correctly it becomes necessary to consider briefly what the legislature sought to accomplish in enacting the trading-stamp statute and just wherein lay the crux of the evil sought to be remedied. An examination of the cases holding that it is within the legislative power to regulate or prohibit the use of trading stamps offering premiums will show that the evil lay in the lure of the object or thing offered as a prize. *Trading Stamp Cases,* 166 Wis. 613, 166 N. W. 54; *Rast v. Van Deman & Lewis Co.* 240 U. S. 342, 36 Sup. Ct. 370; *Tanner v. Little,* 240 U. S. 369, 36 Sup. Ct. 379; *Pitney v. Washington,* 240 U. S. 387, 36 Sup. Ct. 385. And it was this lure or temptation to improvidence alone that brought the business within the scope of the police power. Except for that the business would occupy the same status that any other legitimate business occupies. In order that there might be no mistake as to the precise evil that was sought to be remedied, the legislature *ex industria* exempted a cash discount, and provided that slips, tickets, or tokens might be issued for the same, redeemable by the issuer. This affirmatively takes the cash-discount system out from the condemnation of the statute. The only proviso imposed upon it was that the issuer should make the redemption. Under the trading-stamp business as it had been largely conducted the customer had to rely for redemption upon a third party located at a distance from the merchant's place of business, as in the case of *State ex rel. Downey-Farrell Co. v. Weigle,* 168 Wis. 19, 168 N. W. 385. And for that reason the court held in the latter case that the statute was not complied with because the issuer did not become financially re-

sponsible for the redemption as contemplated by the statute, but sought to contract with the customer to look solely to a third party for redemption. It was no doubt the legislative thought that the customer should have the financial responsibility of the merchant with whom he dealt back of the redemption, and that he should not be compelled to deal with persons at a distance, but should have a convenient place for redemption at home. In this case the issuer is financially responsible for the redemption and makes it when requested, and a convenient place at home for redemption by plaintiff is provided. The objects sought by the statute are therefore complied with. No intention to unreasonably hamper the giving of cash rebates can be ascribed to the legislature, nor can any construction be given the act as to this feature that would not be given to any other act dealing with a lawful business. To say that a lawful business cannot be transacted through an agent, conceding the constitutionality of a statute given such a construction, would be to give the act a meaning so narrow as to practically emasculate that which the legislature sought to save. The language of the act limiting redemption to the issuer must be given the meaning usually accorded such language when applied to a legitimate business and cannot be held to limit redemption to a personal or manual one by the issuer or by his servants or employees only. It must be held to include an agent for whose acts the principal is responsible, because in law the redemption by an agent is the redemption of the principal and not that of the agent. We are convinced the legislature did not intend to annul the law of agency, even if it had the power, in respect to a business affirmatively sanctioned by it. If there is no lure when the principal redeems *in propria persona,* there is no lure when his agent redeems for him. For these reasons the circuit court correctly entered the orders appealed from.

By the Court.—Orders affirmed.

SCHROEDER & DALY COMPANY and another, Appellants, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

June 2—June 25, 1919.

Workmen's compensation: "Performing service growing out of and incidental to his employment."

Where a salesman, required by his duties to go from place to place in a city, slipped and injured his leg on a public street while so engaged, he is "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats.; and the accident cannot be considered the result of an ordinary street risk.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The applicant, *Paul Toll,* a salesman in the employ of the *Schroeder & Daly Company,* was required by his duties to go from place to place in the city of Milwaukee selling produce to grocerymen. On January 31, 1918, while so engaged and while traveling from one place to another and while on the public street, he slipped and injured his right leg. Upon application to the *Industrial Commission* he was awarded compensation. This action was brought in the circuit court for Dane county to review the award made by the *Industrial Commission.* The circuit court affirmed the award, and from such judgment of affirmance the plaintiffs appeal, the *Employers' Mutual Liability Insurance Company* being the insurer of the employer.

For the appellants the cause was submitted on the brief of *Brown, Pradt & Genrich* of Wausau.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ROSENBERRY, J. The only question presented here is whether or not *Toll* at the time of the injury was performing

services growing out of and incidental to his employment (sub. (2), sec. 2394—3, Stats.). It is the contention of plaintiffs that the injury sustained by the applicant is one which did not grow out of his employment, but was the result of an ordinary street risk. This contention is based upon the proposition laid down in *McNicol's Case,* 215 Mass. 497, 102 N. E. 697, that the causative danger must be peculiar to the work and not common to the neighborhood, and upon *Hoenig v. Industrial Comm.* 159 Wis. 646, 150 N. W. 996, where it was held that an injury caused by lightning stroke while the applicant was working on a dam and not exposed by reason of his employment to a hazard peculiar to the industry or differing from a hazard to which all outdoor workers are exposed, was not one arising out of or incidental to his employment.

The use of the word "peculiar" in this connection is perhaps unfortunate and not exactly accurate. A hazard *peculiar* to an industry, as that word is most frequently used, is a hazard which belongs exclusively to that industry. That the word, however, is not used with that meaning in the cases referred to, is plain upon a moment's reflection. It is used rather in the sense of a risk which appertains to the particular industry, or, in other words, a risk which is inseparably connected with it and so incidental to it. While it is said in the *Hoenig Case* that the matter turns upon the nature of the hazard, when the statement is taken in connection with the context it will be seen that the pivotal question is as stated in *Ellingson L. Co. v. Industrial Comm.* 168 Wis. 227, 169 N. W. 668, Is the injury one resulting from a hazard that necessarily pertains to the industry or is substantially increased by reason of the nature of the services which the applicant is required to perform? Substituting for the word "peculiar" a phrase embodying the meaning with which that word is used, the question may be restated thus: Is the injury one resulting from a hazard pertaining to and inseparably connected with the industry or substantially increased by reason

of the nature of the services which the applicant is required to perform? It is not the nature of the hazard that is the determinative thing, but rather whether or not it is a usual or necessary incident to the employment. Here, the applicant while in the discharge of his duties under his employer's direction was required from time to time to cross public streets. While the hazard to which he was exposed is not peculiar to the employment in the sense that it appertains to it exclusively and is not common to other occupations, it is nevertheless a hazard inseparably connected with the employment and therefore incidental to it. An employee who is required in the usual course of his employment to cross and recross streets almost constantly is certainly much more likely to suffer injury from street hazards than one not so circumstanced. The hazard to which the applicant in this case was exposed was not only inseparably connected with his employment and incidental to it, but the hazard was substantially increased by reason of the nature of the services which he was required to perform.

If it should be held that messengers, deliverymen, salesmen, and others who by the nature of their employment are required to be continually on the streets and highways, are not entitled to compensation for injuries received in the course of their employment if the injury occur on a street or highway, a large class of worthy applicants would be cut off and the workmen's compensation law emasculated. If an employee in the course of his employment is required to go up and down a stairway occasionally or frequently and while so doing falls and injures himself, should he be denied compensation because every one uses stairways and is continually liable to receive like injuries? Clearly not. The risk of injury to the applicant in this case was incidental to his use of the street in the course of his employment, and was peculiar to the employment in that the work of the employee could not be carried on without his subjecting himself to that risk; it therefore grew out of his employment. The fact that

others may be exposed to like risks does not change the character of the risk to which the applicant was exposed. *Globe Ind. Co. v. Industrial Acc. Comm.* (Cal.) 171 Pac. 1088; *In re Harraden* (Ind.) 118 N. E. 142; *Industrial Comm. v. Ætna L. Ins. Co.* (Colo.) 174 Pac. 589; *Foley v. Home R. Co.* 91 N. J. Law, 323, 99 Atl. 624; *Kunze v. Detroit S. T. Co.* 192 Mich. 435, 158 N. W. 851; *Dennis v. A. J. White & Co.* 86 L. J. K. B. 1074.

By the Court.—Judgment affirmed.

STATE, Plaintiff in error, vs. ROBERTS, Defendant in error.

June 2—June 25, 1919.

Fornication: Adultery: Nature of offenses.

1. Adultery was a common-law crime, consisting of intercourse by any man, married or single, with a married woman not his wife, and was condemned because it tended to introduce spurious heirs into a family.
2. Fornication, although cognizable in England under the ecclesiastical law, was not punishable as a common-law offense unless accompanied by such circumstances as to render it a public nuisance.
3. Under the statutes of this state, a married man who has sexual intercourse with an unmarried woman is guilty of fornication as well as of adultery.

ERROR to review a judgment of the municipal court of Milwaukee county: E. B. BELDEN, Judge. *Reversed.*

The defendant in error was convicted in the district court of Milwaukee county of the crime of fornication with a single female, upon two counts. From such conviction and judgment he appealed to the municipal court of Milwaukee county, where, before any proceedings were had, he filed a special plea in bar to the effect that he was a married man, and that if any offense was committed by the defendant, as alleged in the complaint, such offense was and is the offense of adultery, as such offense is defined in and by the provisions

of sec. 4576, Stats., and not of the crime of fornication, as set forth in sec. 4580, under which section the prosecution was initiated; that during all of said time the defendant was a resident of the county of Waukesha and state of Wisconsin, and that the prosecution for the crime of adultery is barred and forbidden by sec. 4576, Stats., which provides that "No prosecution shall be had unless commenced within one year from the date of the alleged offense." The special plea in bar was sustained by the court and the defendant ordered discharged, whereupon the state sued out this writ of error, and the case is before this court for review.

For the plaintiff in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *Arthur H. Bartelt,* assistant district attorney; and the cause was argued orally by *Mr. Zabel* and *Mr. Bartelt.*

For the defendant in error there was a brief by *Thomas M. Kearney* of Racine, of counsel, and oral argument by *Raymond J. Cannon* of Milwaukee and *Peter J. Myers* of Racine.

OWEN, J. The single question presented is whether, under our statutes, a married man who has illicit intercourse with a single female is guilty of the crime of fornication. Sec. 4580, Stats., provides:

"Any man who commits fornication with a sane single female over the age of sixteen years, each of them shall be punished by imprisonment in the county jail not more than six months or by fine not exceeding one hundred dollars, or by both such fine and imprisonment. Any man who commits fornication with a sane female of previous chaste character under the age of twenty-one years shall be punished by imprisonment in the state prison not more than four years or by fine not exceeding two hundred dollars, or by both fine and imprisonment."

It is the contention of the defendant in error that under the decisions of this court *(Hunter v. U. S.* 1 Pin. 91. and *State*

v. Fellows, 50 Wis. 65, 6 N. W. 239) a married man who has illicit intercourse with a single female commits the crime of adultery and cannot be convicted of the crime of fornication; that a prosecution for the crime of fornication, as here attempted, does not lie, because the crime is adultery and not fornication; and that the defendant cannot be prosecuted for adultery because the statute of limitations has run on that offense.

Adultery was a common-law crime. It consisted of intercourse by any man, married or single, with a married woman not his wife. 2 Corp. Jur. 11. Adultery was condemned at common law because it tended to introduce spurious heirs into a family and to adulterate the issue of an innocent husband and turn the inheritance away from his own blood to that of a stranger. *State v. Lash,* 16 N. J. Law, 380. Fornication, although cognizable in England under the ecclesiastical law, was not punishable as a common-law offense unless accompanied by such circumstances as to render it a public nuisance. 19 Cyc. 1434. By the canon law it was the unlawful sexual intercourse of a single person with another of the opposite sex, whether married or not; while by the common law it was such intercourse between a man, whether married or single, and an unmarried woman. Id. In most of the states statutes have been enacted punishing the act of fornication, but there is a lack of harmony under such statutes as well as the decisions construing them as to what constitutes the offense of fornication.

The offense, as we are here dealing with it, must be regarded as statutory, and the nature, scope, and extent thereof must be determined by an examination of the particular statute involved. In passing, it may be well to observe that at common law illicit intercourse by any man, whether married or single, with a married woman constituted adultery. On the other hand, intercourse by any man, either married or single, with a single female constituted fornication. It was the status of the female which determined the character of

the offense. Most statutes punish adultery and fornication in conformity with these definitions. All illicit intercourse is punishable either as adultery or as fornication, depending upon the status of the female, where occurring under circumstances that do not constitute some other crime, such as rape, seduction, etc.

Our present statutes punishing adultery and fornication (secs. 4576 and 4580) appeared in ch. 139 of the Statutes of 1849 in substantially their present language. If in enacting these statutes the legislature had in mind the common-law definitions of adultery and fornication as hereinbefore stated, there was no overlapping of offenses in the sense that a married man having illicit intercourse with a single female could be guilty of both adultery and fornication. However, the case of *Hunter v. U. S., supra,* had been decided by our territorial court prior to the enactment of the statutes in question, and it must be presumed that when the legislature used the language now appearing in sec. 4580, that *any man* who commits fornication with a sane single female, etc., shall be guilty of the crime of fornication, the expression was not used inadvertently, but rather, it must be assumed, the legislature meant what it so plainly said. This thought is further reinforced by the language of the section providing that "each of them shall be punished." If it were to be held that a married man who commits fornication with a single female is not guilty of the crime of fornication, it could be plausibly argued that the female could not be convicted, as the statute makes them equally guilty, and unless the man is guilty neither is the woman. *State v. Fellows,* 50 Wis. 65, 6 N. W. 239, was decided in 1880. By ch. 73, Laws 1882, very shortly after the decision in the *Fellows Case,* the legislature added to sec. 4580 the provision that "In case *any man* shall commit fornication with a female of previous chaste character," etc., he shall be punished, etc. It will thus be seen that the attention of the legislature was called to this section after the decision in the *Fellows Case,* and it not only left un-

touched the provision that any man who commits fornication with a sane single female shall be punished, etc., but added a new provision, making use of the very same language, to the effect that *any man* who commits fornication with a sane single female of previous chaste character shall be punished, etc. That in this instance it meant to include married, as well as unmarried, men may be inferred from the fact that the punishment prescribed is greater than is that for adultery. It will thus be seen that very little room is left to justify courts in the assertion that the ordinary meaning of the plain language of sec. 4580 was not intended by the legislature, and that when the legislature used the expression "any man" it meant only any *unmarried* man. The word "unmarried" must be interpolated to justify the disposition made of this case by the municipal court. While cases arise where it is necessary to interpolate language in order to give effect to the evident legislative intent, it should only be done where such a necessity clearly exists. We see no such necessity here. No absurdity follows from according to the legislature the meaning which is ordinarily ascribed to the language used.

While it may be that legislation in general upon this subject does not make a married man guilty of both adultery and fornication, as is the result here, yet a so-called overlapping of offenses is by no means anomalous. It frequently happens that a single act may be punishable as for one of two or more offenses. If the result is at all inimical to public policy it is a situation requiring the attention of the legislature. So far as the instant case is concerned, the result is not to be regretted. The small measure of punishment to which the defendant in error is amenable but scantily expiates his flagrant and notorious violations of marital obligations, which are responsible for the destruction of one life and the ruination of another.

By the Court.—Judgment reversed, and cause remanded with directions to overrule the plea in bar and for further proceedings according to law.

SCHMIDT, Plaintiff in error, vs. THE STATE, Defendant in error.

June 2—June 25, 1919.

Forgery: Intent to defraud: Evidence: Imitation of signature of another.

1. The inferences of fact to be drawn from the evidence as to whether a bank account belonged to the defendant or to an employee in whose name the deposit was made, being in dispute, a finding by the court that the defendant committed a forgery in drawing a check on the account and signing the employee's name thereto is sustained.
2. The fact that no attempt was made to imitate the employee's signature is not conclusive, it being sufficient under secs. 4454, 4455, Stats., if there was an intent to injure or defraud.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

The plaintiff in error, hereinafter called the defendant, having waived a jury trial was convicted in the municipal court of Milwaukee county of forgery of a bank check for $6, and brings his writ of error to reverse the judgment. The actual facts were not greatly in dispute, but rather the inferences of fact to be deduced therefrom. The defendant was engaged in the piano and phonograph business in Milwaukee in 1917 and the early part of 1918, and the complaining witness, Junkerman, whose name is alleged to have been forged to the bank check in question, was employed by the defendant as a salesman. In the latter part of 1917 the defendant became financially involved, and in December, 1917, a bank account was opened at the First National Bank in the name of Junkerman, in which all the amounts received in the defendant's business were deposited and out of which moneys to pay the bills of the business were drawn by check signed by Junkerman. Defendant testifies that this was done at his request because he had had business reverses and was afraid of his creditors. Junkerman, on the other hand, claims that he opened this account in his own name because

the defendant was gone for a week and he had no place to put the money coming in. While this account was thus kept, Junkerman loaned the defendant $300 and put the money into this account. Checks on this account for disbursements in the defendant's business were drawn exclusively by Junkerman. This account was closed February 26, 1918, and another account opened in Junkerman's name in the East Side Bank. The defendant claims that this latter account was but a continuation of the First National Bank account and was really his own account kept in Junkerman's name. Junkerman, on the other hand, claims that while the moneys deposited in this account were moneys coming in from the business, they were turned over to him by *Mr. Schmidt* to apply on the debt which he *(Schmidt)* owed Junkerman, and became his money; also that while he (Junkerman) drew some checks on that account to pay bills against *Schmidt* they were simply advances made to *Schmidt* at his request out of his (Junkerman's) own money. On April 25, 1918, *Schmidt* drew the $6 check in question on the East Side Bank, signed "W. C. Junkerman," payable to his own order, and indorsed it to one Oberle to pay a debt of his own. He issued four or five other checks of the same kind at about the same time. Payment of them was refused at the bank, and when Junkerman found out that they had been issued a few days later and remonstrated with *Schmidt* he *(Schmidt)* said, "If you feel that way about it I will make good the checks." *Schmidt* afterwards paid the checks. No attempt was made to imitate Junkerman's signature in writing the checks. *Schmidt* claims he had an understanding "in a casual way" with Junkerman that he might sign checks on this account. He signed no others and is still indebted to Junkerman. Junkerman denies that there was any understanding with *Schmidt* that he could draw checks on the account at the East Side Bank, and claims that the moneys in that account were his own individual moneys. Junkerman claims that he quit working for *Schmidt* about May 1, 1918, when

he found out about the issuance of the false checks, but *Schmidt* claims that he (Junkerman) continued to work for him till the 15th or 18th of May, when the business ceased.

For the plaintiff in error there was a brief by *Doerfler, Bender & McIntyre* of Milwaukee, and oral argument by *Christian Doerfler.*

For the defendant in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *Arthur H. Bartelt,* assistant district attorney; and the cause was argued orally by *Mr. Zabel* and *Mr. Bartelt.*

WINSLOW, C. J. Two contentions are made by the defendant, viz.: (1) the funds on deposit in the East Side Bank were in fact his own funds, hence the check was drawn on his own bank account; and (2) no intention to defraud any one appears from the evidence, especially in view of the fact that no attempt was made to imitate Junkerman's signature.

As to the first contention it may freely be admitted that there was room in the evidence to find that the account at the East Side Bank was in fact the defendant's account kept in Junkerman's name, but, on the other hand, Junkerman's testimony was positive that it was his own account and that the money on deposit was his own money.

There was nothing incredible or even improbable about Junkerman's version of the matter. It is undisputed that the defendant was considerably indebted to Junkerman and that he was seriously embarrassed. Such an arrangement as Junkerman testifies to was natural enough, and there are facts which make it appear probable. For instance, it is admitted that no one except Junkerman drew any checks on that account until the drawing of the check in question here, and the bank was never informed that any one except Junkerman had authority to draw checks thereon. It is also admitted that when Junkerman remonstrated with the defendant about the drawing of this check he did not even claim

to have a right to do so, but proceeded to settle up this and several other checks issued at about the same time. The trial court had the advantage of personal contact with the witnesses, and we do not feel that we can say that its conclusion in this regard is not supported by the evidence.

As to the second claim practically the same general considerations apply. The question of a man's intent is generally to be determined by considering his acts and the surrounding circumstances and drawing the conclusion as to his state of mind therefrom. The fact that no attempt was made to counterfeit Junkerman's signature is to be considered, but cannot be held to be conclusive. If there was an intent to injure or defraud any person, either Junkerman, the bank, or the person to whom the false check was given, it is sufficient. Secs. 4454, 4455, Stats. We are unable to say that the trial court was wrong in drawing the conclusion which it did.

By the Court.—Judgment affirmed.

SIEBECKER and OWEN, JJ., dissent.

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ABATEMENT. See INSURANCE, 8.

ABUSE OF DISCRETION. See CRIMINAL LAW, 8, 9. DAMAGES, 2. JUDGMENT, 1. PLEADING, 2.

ACCEPTANCE. See CONTRACTS, 2. CORPORATIONS, 10. SALES, 8.

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ACTION.

At common law. See ADMIRALTY, 1.

In rem. See ADMIRALTY, 4.

In justice's court. See JUSTICES OF THE PEACE, 1.

By whom to be brought: Who may maintain. See TRUSTS, 2.

Parties: Infant appearing by guardian ad litem.

Where, either as a plaintiff or a defendant, an infant appears by a guardian *ad litem* appointed by the court, the infant, not the guardian *ad litem,* is the party to the action. *Scheiderer v. A. George Schulz Co.* 6

Abatement. See INSURANCE, 8.

Consolidation. See CORPORATIONS, 8.

Dismissal. See LANDLORD AND TENANT, 5.

Revival. See EXECUTORS, 5. GUARANTY, 2.

ADJOINING LANDOWNERS.

See TRESPASS.

Right to lateral support: Buildings: Notice of intention to excavate.

1. A lotowner has an absolute right, so far as his land is in its natural condition, to lateral support from the adjoining lot. *Hickman v. Wellauer,* 18

2. If a lotowner has added to the weight of the soil by the erection of a building, he must himself provide proper support and care for such additional load whenever the owner of the adjoining lot wishes to excavate thereon; but reasonable notice of the intention to excavate on such adjoining lot so near the building that danger thereto might reasonably be anticipated must be given to the owner of the building so that he may have an opportunity to protect and support it. *Ibid.*

Same: Regulation by municipalities.

3. The established property rights above mentioned cannot be taken away or substantially changed except by express declaration of the legislature, either by statute or by express delegation of such a power to a city council. They were not, in this case, affected by a municipal ordinance (adopted under

the general authority given by the city charter to the common council "to control and regulate the construction of buildings," etc.) providing that "no one shall excavate so as to injure any adjoining ground or building." *Hickman v. Wellauer,* 18

Excavation: Support of buildings: Negligence: Measure of damages.

4. Without having given any notice, the owner of an adjoining lot began excavating near and beneath the foundation of plaintiff's building, and, assuming that under the ordinance he was bound to support the building, he began underpinning said foundation with concrete. Plaintiff obtained a temporary injunction, but a motion to vacate it was at once made. Pending such motion the work was continued and a large part of it had been completed when, some days later, the injunction was vacated and modified so as to permit the removal of earth and supports from and under the building under the direction and advice of competent and capable engineers and with the approval and consent of the building inspector of the city; a bond being required and given for payment of any judgment plaintiff might recover in the action. The method used in the undermining and underpinning of plaintiff's building was not the usual and proper one, but was adopted because of its supposed convenience and economy; and the work caused the building to list, cracking and injuring it. *Held,* that under the circumstances there was more than a gratuitous performance by defendant of plaintiff's obligation to support his own building, and that there had arisen an obligation on defendant's part to prosecute the work by proper methods and with reasonable skill and care and a liability for damages caused by a breach of such obligation. *Hickman v. Wellauer,* 18
5. The diminution in the value of the building was the proper measure of plaintiff's damages; and defendant was not entitled to any allowance for the expense of doing the work. *Ibid.*

ADMINISTRATIVE BODIES. See COURTS, 1.

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADMIRALTY.

Jurisdiction: Action in personam: Saving of common-law remedy.

1. Under sec. 9 of the federal Judiciary Act of 1789 and sub. 3, sec. 24, and sec. 256 of the Judicial Code, admiralty jurisdiction is vested exclusively in the United States district courts, saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. *Georgia C. Co. v. American M. Co.* 456
2. The work of a stevedore in loading or unloading a ship lying at a wharf is maritime service, and actionable injuries received during such work are so far maritime injuries that recovery may be had for them in the admiralty courts by libel *in personam* against the stevedore company which employs him. *Ibid.*

Workmen's compensation: Actions in rem: Jurisdiction of state courts.

3. Workmen's compensation laws provide remedies wholly unknown to the common law, which are incapable of enforcement by the ordinary process of any court, and are not saved to suitors by the saving clause in sec. 9 of the Judiciary Act of 1789, relating to admiralty jurisdiction. *Georgia C. Co. v. American M. Co.* 456

4. The common-law jurisdiction of the state courts over torts committed at sea is preserved by such saving clause, but remedies by proceedings *in rem* can only be administered in the admiralty courts. *Ibid.*

Injuries to stevedores: Damages.

5. Where a stevedore is injured while unloading a vessel at a wharf and does not seek a remedy against the vessel itself, he may recover full damages in a common-law action in a state court, and *it seems* may recover the same in an action in a maritime court. *Georgia C. Co. v. American M. Co.* 456

ADMISSIONS. See EVIDENCE, 6.

ADULTERY.

Nature of crime: Fornication: Statutory crimes.

1. Adultery was a common-law crime, consisting of intercourse by any man, married or single, with a married woman not his wife, and was condemned because it tended to introduce spurious heirs into a family. *State v. Roberts,* 570

2. Under the statutes of this state, a married man who has sexual intercourse with an unmarried woman is guilty of fornication as well as of adultery. *Ibid.*

ADVERSE EXAMINATION. See BANKS, 4. EVIDENCE, 9. WITNESSES, 8.

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Of verdict. See TRIAL, 14.

ANARCHIST. See CONSPIRACY, 2.

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APPEAL AND ERROR.

Decisions reviewable: Judgments in different actions.

1. Where, after a judgment of the Milwaukee civil court was reversed and a new trial ordered in the circuit court, plaintiff commenced a new and independent action in the circuit court, against an additional defendant, and for an amount over which the civil court had no jurisdiction, he cannot, by includ-

ing in the notice of an appeal from the judgment in the new action an appeal from the order reversing the judgment of the civil court in the original action, obtain a review of such order. [Whether, upon an appeal from a judgment of the circuit court, the supreme court will review an order of that court reversing a judgment of the civil court *in the same action*, not determined.] *Holub v. Cootware,* 176

Matters not of record. See CRIMINAL LAW, 7. GARNISHMENT.

Same: Form of order: Order or judgment? See COURTS, 3.

2. A direction of the civil court of Milwaukee county, in an action for unlawful detainer, that "this action be and the same is dismissed," though in form an order, is in fact and in effect a judgment, and is appealable, being an order of dismissal as distinguished from an order directing judgment of dismissal. *Hassler v. Sheets,* 419

Time of taking appeal: Taxation of costs: Milwaukee civil court.

3. A judgment of the Milwaukee civil court which provides for costs, to be effective so that it may be the subject of an appeal, must be perfected by the taxation and insertion of such costs or by the expiration of the period of sixty days under sec. 2894*a*, Stats., within which costs may be taxed and inserted. *Richter v. Lukaszewicz,* 61

4. Thus where an order for judgment in defendant's favor was signed on June 19th and on August 20th defendant attempted to tax his costs, but such taxation was disallowed, apparently because more than sixty days had elapsed, a notice of appeal from said judgment filed on September 7th was within the time limited for the taking of an appeal. *Ibid.*

5. Sec. 3763, Stats. (relating to justices' courts, but applicable also to the Milwaukee civil court), providing that upon an appeal the return of the testimony, proceedings, etc., to the appellate court shall be made after ten days and within thirty days after the appeal shall have been perfected, is directory only, and the return may be made after said thirty days. *Ibid.*

Correction of defective return.

6. If such return be defective the appellate court may, in its discretion, direct a supplemental return to be made. *Richter v. Lukaszewicz,* 61

7. Where the appealing party has done all within his power, the appellate court will afford him an opportunity to perfect his appeal rather than dismiss it, the statutes in such case being liberally construed in order to preserve the remedy by appeal. *Ibid.*

Same: Inability of clerk to perfect return: Disposition of case.

8. Where the clerk of the Milwaukee civil court was unable to make a return upon appeal as provided in sec. 3763, Stats., because the stenographer who took the testimony had entered the military service of the United States and no one had been found who could read his notes and transcribe the testimony, the appellate court, instead of dismissing the appeal, should

have directed said clerk to make a return of the record as it then was, certifying the reasons why it was incomplete, and should then have held the case until a transcript of the testimony could be furnished or some other disposition made. *Richter v. Lukaszewicz,* 61

Assignment and argument of errors.

9. On appeal to this court, generally only errors assigned and argued in the brief will be considered. *W. H. Shenners Co. v. Delzer,* 507

Review: Discretion of lower court. See ABUSE OF DISCRETION.

10. The granting or refusing of a new trial for newly discovered evidence is within the discretion of the trial judge, and can be reversed on appeal only when there is a clear case of mistake. *Sweet v. Modern Woodmen,* 462

11. The form of a special verdict rests in the sound discretion of the trial court, and that discretion will not be interfered with so long as the issues of fact in the case are covered by appropriate questions. *Ehlers v. Automobile Liability Co.* 494

12. The vacation of a default judgment during the term of its rendition is peculiarly within the control of the trial court, and its ruling cannot be disturbed except for an abuse of discretion. *Sawicki v. Wulff,* 377

Same: Questions of fact, verdicts, and findings. See CONTRIBUTION, 2. CORPORATIONS, 1.

13. Where in an action by a broker for commissions for securing an exchange of property for defendant the defense was fraud in securing the contract, and a single witness for the plaintiff testified that defendant read the contract before he signed it, and the jury, as triers of the fact, evidently believed the witness, a general verdict for plaintiff cannot be said not to be based on competent credible evidence. *W. H. Shenners Co. v. Delzer,* 507

14. In an action by a wife against her husband's estate, issues as to whether plaintiff's father gave her a note and mortgage executed by her husband, whether she loaned him money, and whether he had paid her, are, considering the relationship of the parties, peculiarly questions of fact on which the jury's findings, if sustained by the evidence, will not be disturbed. *Flanagan's Estate v. Flanagan's Estate,* 537

15. The supreme court will attach great weight to the findings of a jury on questions of fact submitted to them, and, where they are supported by credible evidence, they will not be reversed. *Lehan v. Chicago & N. W. R. Co.* 327

16. Findings not against the clear preponderance of the evidence will be approved on appeal. *Behrend v. Buchmann,* 242

17. The result reached in the trial court should not be disturbed on appeal unless clearly wrong. *Bell v. Milwaukee E. R. & L. Co.* 408

Same: Harmless error: In remarks of court.

18. Any misleading tendency of the court's remarks, in presence of the jury, that if a railway company was negligent it was in failing to operate its car properly up to the time a pedestrian who was crossing its tracks was discovered to be in danger, is *held* cured by an instruction. *Williams v. Duluth St. R. Co.* 261

Same: In rulings on evidence and examination of witnesses. See CONTRACTS, 6. CRIMINAL LAW, 3–5, 10. DAMAGES, 7. EXECUTORS, 2, 3. HIGHWAYS, 2. WITNESSES, 5.

19. Sustaining an objection to a question asked for the purpose of impeaching defendant could not have been prejudicial where defendant had already denied the fact assumed in the question, and the question referred to admissions made to third persons, who testified in behalf of plaintiff without being questioned with reference to such admissions. *Klein v. Beeten,* 385

20. In cases tried by the court the reception of incompetent evidence will not be held prejudicial unless it is the only evidence supporting some essential feature of the judgment. *Bell v. Milwaukee E. R. & L. Co.* 408

21. In jury cases the reception of incompetent evidence is not reversible error unless in the judgment of the court the result might probably have been different had it been excluded. *Ibid.*

22. The fact that plaintiff called certain witnesses as adverse witnesses under sec. 4068, Stats., was not prejudicial to defendant, even if they were not within the classes named in that section, where all the testimony favorable to defendant on the vital issues in the case was fully and fairly placed before the jury. *Shine v. Hagemeister Realty Co.* 343

23. Under sec. 3072*m*, Stats., error in admitting a conductor's report of a street railway accident, substantially covered by his testimony, in the reception of the contents of a medical work and of an expert opinion that plaintiff's injury was permanent, in view of the conflict in the evidence, the jury's opportunity to note plaintiff's conduct and appearance and to judge of his credibility, and of a direct conflict in the medical testimony, was not prejudicial error. *Bell v. Milwaukee E. R. & L. Co.* 408

24. Error in compelling production of defendant's report or notice of an automobile accident to his insurer after his unresponsive answer to an objectionable question stating that he had made the report, could not be attributable to the question and was not prejudicial error. *Kellner v. Christiansen,* 390

25. Where, on motion to strike certain testimony and admonish a witness, the court told him to give facts and not conclusions but did not direct the striking of the objectionable testimony, the omission was not prejudicial error. *Williams v. Duluth St. R. Co.* 261

Same: In instructions and form of verdict.

26. Under sec. 2829, Stats., in an action against a city for the death of a bather who was drowned at its bathing beach by getting into an excavation made by the city for the purpose of extending its private waterworks system, a verdict technically defective as finding the city liable in its governmental capacity, but actually proper as finding it liable solely by reason of acts which it committed in its proprietary capacity, is *held* harmless as to the city. *Nemet v. Kenosha,* 379

27. A clerical error of the court in mistaking the name of claimant's brother in a special verdict is *held* not to have misled the jury, and was properly corrected by the court after verdict. *Flanagan's Estate v. Flanagan's Estate,* 537

28. Where imperfections in the form of a special verdict as submitted to the jury did not appear to have resulted in an injustice to defendant, against whom there was a judgment, they could not be held to be prejudicial error on appeal. *Kellner v. Christiansen,* 390

29. Where the undisputed facts showed that deceased was guilty of more than slight negligence, error in instructions as to the care required of him in approaching a railroad crossing was not prejudicial. *Todoroff v. Chicago & N. W. R. Co.* 554

30. It being undisputed that the defendant's employees, when they took a clock upon which plaintiff had failed to make an instalment payment when due, were acting in the course of their employment, an instruction to the jury that they should find for the plaintiff if the defendant's employees assaulted her was not error though it did not also embrace the question whether the assault was committed while the employees were acting in the course of their employment; especially is this so in view of the fact that the defendant did not request a more favorable instruction. *Gerstein v. C. F. Adams Co.* 504

31. An instruction that the operation of a street car at a speed exceeding the limit fixed by a city ordinance is negligence in itself, if error, is not prejudicial where the findings of the jury sustain the judgment regardless of the question of violation of the ordinance. *Alshuler v. Milwaukee E. R. & L. Co.* 477

32. It was not prejudicial error to refuse to submit a question as to whether the parties had entered into a contract such as defendant attempted to prove, where the court instructed, "If you are satisfied to a reasonable certainty," etc., "that the agreement referred to in the second question [the agreement set up by plaintiff] was entered into and made by and between," etc., "you will answer the question 'Yes,' and if you are not so satisfied your answer will be 'No;'" an affirmative answer negativing any other contract. *McNaughton v. McClure,* 288

Same: Error in immaterial matters.

33. In an action to recover the balance due on a contract to install a heating plant, with a counterclaim for failure to install the same within the contract time so that frost broke up the basement cement floor, the admission of incompetent evidence on the question whether it was performed within the contract limit was not prejudicial, where the evidence showed that the damage to the floor did not result from plaintiff's delay. *Shine v. Hagemeister Realty Co.* 343

Disposal of case. See COSTS. FRAUD, 4.

Affirmance and reversal. See APPEAL, 1, 2, 8, 10–12, 15, 20–22. COURTS, 2, 3. EXECUTORS, 9.

34. Where the purchaser under an earnest-money contract in fact paid $1,000 in discharge of his liability, the contention that the court erred in finding that a $1,000 draft deposited by the purchaser as earnest money was paid is technical and without merit, it being immaterial whether the draft was taken up and canceled. *Pederson v. Johnson,* 320

Verdicts based on incompetent or immaterial evidence. See EVIDENCE, 7, 8.

Same: Prejudice or passion of jury. See EVIDENCE, 13.

Interest on reversal of case. See EXECUTORS, 9.

Appeal from justice's court. See JUSTICES OF THE PEACE.

ARCHITECT'S CERTIFICATE. See CONTRACTS, 5.

ARGUMENT OF COUNSEL. See APPEAL, 9. CRIMINAL LAW, 5.

ASSAULT AND BATTERY. See APPEAL, 30. CRIMINAL LAW, 10. EVIDENCE, 9. HOMICIDE, 2. MASTER AND SERVANT, 3. STREET RAILWAYS, 11.

ASSAULT WITH INTENT TO MURDER. See CONSPIRACY. CRIMINAL LAW, 2. HOMICIDE, 1.

ASSIGNMENT OF ERRORS. See APPEAL, 9.

ATTORNEY AND CLIENT. See JUDGMENT, 1.

AUTOMOBILES.

See DEATH, 2. EVIDENCE, 2, 7. NEGLIGENCE, 6. PLEADING, 3. TRIAL, 12. WITNESSES, 1.

In service of common carrier: Indemnity bond: En route for repairs.

1. An automobile is being operated "in the service of a common carrier," within the terms of an indemnity bond, not only when carrying passengers on its route, but when running to a repair shop for repairs to enable it to continue its service as a common carrier. *Ehlers v. Automobile Liability Co.* 494

Injuries to persons in street: Negligence: Violation of municipal ordinance.

2. A load of kindling wood had been dumped, in front of plaintiff's house, partly in the street, and while he was in the street, after dark, putting some of the wood in a basket to carry it to his basement, he was struck and injured by an automobile.

Upon evidence that he had failed to comply with a city ordinance which required that a light be displayed on the wood after it became dark, it is *held* that the jury were warranted in finding that he was guilty of negligence which proximately contributed to the accident. *Holub v. Cootware,* 176

Same: Negligence: Excessive speed: Question for jury.

3. The evidence in this case is *held* to sustain the jury's finding of defendant's want of ordinary care in driving his automobile at a dangerous rate of speed, in the light of the conditions confronting him and having regard to the width, traffic, and use of the highway. *Kellner v. Christiansen,* 390

4. In an action for personal injuries sustained by plaintiff when struck by an automobile negligently driven by defendant, the issue of plaintiff's contributory negligence, where the evidence was conflicting, was for the jury. *Ibid.*

Collision with street car on crossing: Negligence: Question for jury.

5. As plaintiff, driving an automobile in the city of Milwaukee, approached a cross street on which were defendant's street railway tracks his view to the south was obstructed until he was about twenty-five feet from the north-bound track. He was then running from five to eight miles per hour. Looking south he saw a street car approaching about 175 feet away, decided he could cross safely in front of it, and shifted his gears accordingly. He did not look again in the two seconds within which his automobile reached the track. The car, running twenty-five miles per hour, struck his rear wheel. *Held,* that the question of his contributory negligence was one for the jury. *Dahinden v. Milwaukee E. R. & L. Co.* 1

BANKS AND BANKING.

Control and regulation: Loans in excess of statutory limit: Effect on guaranty of payment.

1. A guaranty of payment may cover existing indebtedness to a bank at the time the guaranty is made, even though such indebtedness exceeds the statutory limitation prescribed in sec. 2024—32, Stats. *Mitchell St. State Bank v. Froedtert,* 120

2. In this case the evidence is *held* not to show that, after the guaranty in suit was given, there was any violation of sec. 2024—32, Stats., limiting the liability of any person to any bank, or of sec. 2024—34, prohibiting loans by a bank to its officers except upon certain conditions. *Ibid.*

Liquidation by commissioner of banking: Duty to keep secret information obtained in examinations.

3. The duty imposed on the commissioner of banking by sec. 2020, Stats., to keep secret all of the facts and information obtained in the course of an examination of a bank, is not terminated by the action of the commissioner in closing the doors of a bank and instituting liquidation proceedings. *Cousins v. Schroeder,* 438

Same: Examination of commissioner of banking: Trial.

4. In view of sec. 2842, Stats. 1917, defining "trial," an examination of a plaintiff before answer, under sec. 4096, is not in substance and effect calling the party as a witness on a "trial in a court of justice" within the contemplation of sec. 2020, enjoining secrecy on the state commissioner of banking concerning official reports. *Cousins v. Schroeder,* . 438

5. The words "or trial in a court of justice," in the clause "except when called as a witness in any criminal proceeding or trial in a court of justice," in said sec. 2020, Stats., refer to the preceding part of the clause specifying a criminal proceeding, and the word "trial" refers only to trials in criminal actions. *Ibid.*

Same: Liability of stockholder. See EXECUTORS, 8.

Representation of bank by cashier: Authority: Effect of acts and declarations. See BILLS AND NOTES, 1.

6. One who borrowed money from a bank on his notes in order to purchase bonds of a corporation in which he was a stockholder is entitled to rely on statements of the cashier (who was also a stockholder and trustee of the corporation) that the bank would sell the bonds and apply the proceeds in payment of the notes, for which the bonds would be held as collateral, and is not responsible for the conversion of the bonds by the cashier, the acts and declarations of the cashier being those of the bank. *Mitchell St. State Bank v. Schaefer,* 543

7. The cashier had full authority to receive such bonds as collateral on behalf of the bank for notes given to it, where as stockholder and trustee his only interest in the matter was to get par value for the bonds of his corporation. This having been accomplished, he had no further interest, and his acts bind the bank. *Ibid.*

Customers' accounts: Withdrawal by agent. See HUSBAND AND WIFE, 1.

BATHING BEACH. See MUNICIPAL CORPORATIONS, 2.

BENEFIT ASSOCIATIONS. See INSURANCE, 9.

BEQUEST. See BILLS AND NOTES, 5.

BIDDING.
At foreclosure. See CORPORATIONS, 1.
At tax sales. See CONSTITUTIONAL LAW, 3, 4.

BILL OF LADING. See CARRIERS, 6.

BILLS AND NOTES.

See EXECUTORS, 4–7. GUARANTY, 1, 4. HUSBAND AND WIFE, 1, 2. LIMITATION OF ACTIONS, 3.

Validity: Execution by manager of corporation: Indorsement: Application of proceeds. See BANKS, 1, 2, 6.

1. It appearing that one E., managing the business of certain lumber companies as if he were the sole owner, was using his personal account in the plaintiff bank and drawing checks thereon for the benefit of the companies, that he had authority to make

the notes in question as he did, and that the bank did not profit by the credits given to him and did not know that he was misappropriating any of the proceeds of the notes in question, and it not appearing that after he deposited the proceeds of said notes to his personal account he used them for his personal benefit, the mere fact that such proceeds were credited to his account did not necessarily make the notes void. At most the knowledge which the bank had was only sufficient to put it upon inquiry as to the validity of the notes, and such inquiry would not have shown that E. had no authority to make the notes. *Mitchell St. State Bank v. Froedtert,* 120

2. When the bank discounted one of the notes in question, executed by E. in the name of one of the lumber companies, it issued to him a cashier's check payable to the order of said company, which check was indorsed in blank by E. in the name of the company and in his own name and then deposited to his personal account. *Held,* that this check was commercial paper and issued for a valuable consideration, and even if the funds derived from the check were misappropriated the note for which the check was given was nevertheless valid if duly executed. *Ibid.*

Holder in due course: Collateral security: Notes given in gambling transactions.

3. Where a promissory note was duly transferred as collateral security to an innocent holder for value in due course, one who thereafter purchased it and the debt secured thereby from such holder became, if not himself a party to any fraud or illegality affecting the instrument, entitled to all the rights of said holder in due course; and except in the cases mentioned in sec. 1676—27, Stats., the defense that the note was originally obtained by fraud is not available as against him. *Stevens v. Freund,* 68

[4. Whether, under sec. 1676—27, Stats., the defense that a note was given as a part of a gambling or wagering transaction is available as against a holder in due course, not decided.] *Ibid.*

Payment: Note received as a bequest. See APPEAL, 14. LIMITATION OF ACTIONS, 3. WITNESSES, 3.

5. In an action to compel delivery of a note given by plaintiff to deceased and by deceased bequeathed to defendant, the evidence is *held* to sustain a finding that the note had not been paid. *Thome v. Crawford,* 482

BOARD OF EDUCATION. See SCHOOLS, 2.

BONDS. See DEATH, 2. PLEADING, 3.

BOUNDARIES.

See LANDLORD AND TENANT, 1.

Boundary agreements: Homestead: Consent of wife.

Land involved in an agreement as to the boundary line of town lots was not the homestead of one of the parties requiring the wife's consent to such agreement, where the land had not been

acquired by such party by his deed and had been in possession of his adjoining owner and predecessors for eighteen years, and where the lot of such party was more than a quarter of an acre, since by making the boundary agreement the party designated as his homestead land other than that involved in the agreement. *Behrend v. Buchmann,* 242

BRIDGES. See EMINENT DOMAIN.

BRIEFS. See APPEAL, 9.

BROKERS.

See APPEAL, 13. CORPORATIONS, 15.

Authority: Broker or agent? Knowledge imputed to principal.

1. Whether the person making a sale is called a broker or an agent is not material, the knowledge of either being the knowledge of the principal. *Lukens I. & S. Co. v. Hartmann-Greiling Co.* 350

Duty to principal: Liability for breach.

2. Though an agent is to sell at a fixed price it is his duty to keep his principal fully informed, and if he knows that more advantageous terms can be obtained he is under obligation to communicate the facts in reference thereto to his principal, and is liable for failure so to do. *Pederson v. Johnson,* 320

Same: Fraud on principal: Contracts for broker's benefit.

3. Though the defendant broker with whom plaintiff had listed property for sale or trade procured plaintiff's signature to an earnest-money contract under which the purchaser agreed, in case of default, to forfeit such earnest money to the defendant, it is *held* that the defendant was liable to the plaintiff for the amount of earnest money forfeited by the purchaser, the insertion of the clause for defendant's own benefit being unauthorized and plaintiff's signature being procured by fraud. *Pederson v. Johnson,* 320

Compensation: Necessity of completed sale: Forfeiture of earnest money by purchaser.

4. In an action by a principal to recover from a defendant broker earnest money forfeited by the purchaser, a finding that defendant was to receive $1,000 for his services is immaterial, where defendant never sold plaintiff's premises and therefore never became entitled to a commission. *Pederson v. Johnson,* 320

5. The fact that the broker had agreed to pay to another a part of the commissions which he was to receive in no way affected his liability to his principal for earnest money forfeited by the buyer and to which the principal was entitled. *Ibid.*

6. The broker being an agent to sell and not merely to procure a purchaser ready, able, and willing to purchase, his right to compensation was dependent upon a sale. *Ibid.*

7. Where there is no evidence showing that the parties with whom plaintiff negotiated for the sale of defendant's real estate were ever willing or able to close a deal with defendant on any terms, plaintiff is not entitled to commissions. *Cusick v. Worthington P. & M. Corp.* 509

BUILDING CONTRACT. See CONTRACTS, 5.

BUILDINGS. See ADJOINING LANDOWNERS, 2, 4, 5. EMINENT DOMAIN.

BULK SALES LAW. See FRAUDULENT CONVEYANCES.

BURDEN OF PROOF. See PUBLIC UTILITIES, 8.

BY-LAWS of fraternal association. See INSURANCE, 9.

CANCELLATION OF INSTRUMENTS. See CONTRACTS, 3. DEEDS, 2.

CARMACK AMENDMENT. See CARRIERS, 7.

CARRIERS.

See DAMAGES. PUBLIC UTILITIES. RAILROADS. STREET RAILWAYS. WORKMEN'S COMPENSATION, 9.

Nature and attributes of a common carrier: Services performed: Workmen's compensation.

1. A common carrier is one who undertakes for hire or reward to transport from place to place the goods of such as choose to employ him. *Waldum v. Lake Superior T. & T. R. Co.* 137
2. It is not so much the extent of the use which the public makes of the facilities owned and operated by a railway company which determines its true character as a carrier, as it is the right of the public to require the services which the company is equipped to perform. *Ibid.*
3. A terminal and transfer railway company, organized and owned by four other railway companies whose lines entered a city, owns steam locomotives but no cars. Its tracks run from the termini of the other companies to the various industries, docks, and elevators in the city, and it is bound to transport thereon, upon a tariff basis approved by the railroad commission, all cars offered to it, not only by the four owning companies, but by any other railway company. *Held,* that it is "operating a steam railroad as a common carrier," within the meaning of sub. (3), sec. 2394—8, Stats. 1915, and an employee injured in its service was not subject to the workmen's compensation act unless both employer and employee had accepted in writing the provisions of the act. *Ibid.*
4. The facts that nearly the whole of the business transacted by the company in question is done for the four railway companies which own it; that it settles with such companies under special contracts; and that it handles no freight except such as it receives from or through other railway companies, so that shippers must contract for its services through other car-

riers, are not material, the significant facts being that the transportation service it renders is in every instance a part of the service contracted for by a shipper, and that any shipper may at any time command such service. *Ibid.*

5. The history of the provisions of the workmen's compensation act relating to railroad companies confirms the construction above given to the words "common carrier" as used in sub. (3), sec. 2394—8, Stats. 1915. *Ibid.*

Carriage of goods: Bill of lading: Foreign shipments: Connecting carriers.

6. The bill of lading issued by a common carrier upon a shipment of goods to a foreign country became the contract between the parties, which could not be varied by a prior oral quotation of a through rate by the agent of the carrier. *Chicago, M. & St. P. R. Co. v. Jewett,* 102

7. As to a shipment to a foreign country, the Carmack amendment to the interstate commerce act (34 U. S. Stats. at Large, 595, ch. 3591) did not apply, and it was competent for the parties to make a contract limiting the carrier's liability to its own line. *Ibid.*

8. As to such a shipment the initial carrier, by its bill of lading, agreed to carry the goods to "its usual place of delivery at said destination, *if on its road,* otherwise to deliver to another carrier on the route of said destination," and it was stated therein that as to the portion of the route beyond its own line it acted only as agent. The goods were so carried to New York by it and its connecting carriers. Payment of the freight charges was there refused by the firm in whose care the goods were consigned for exportation, the consignee having failed to provide funds for such charges. Subsequently the goods were sold to pay the freight, demurrage, and storage charges. *Held,* that there was no default by the initial carrier by reason of the fact that the shipment did not reach its destination, and that it is entitled to recover the freight charges to New York at the published tariff rate as well as storage charges, less the net amount realized by sale of the goods. *Ibid.*

Same: Delay in transportation: Damages because of falling market.

9. A carrier not shown to be insolvent is liable to a shipper for damages resulting from a drop in prices of forest products tendered and awaiting shipment because of delay in transportation owing to the fact that its road was being repaired, where the repairs were unnecessarily delayed owing to a lack of money, which the carrier could have procured if it had used due diligence. *Bell L. Co. v. Bayfield T. R. Co.* 357

CASHIER. See BANKS, 6. GUARANTY, 4.

CERTIFICATE OF CONVENIENCE AND NECESSITY. See STREET RAILWAYS, 3.

CESTUI QUE TRUST. See PROCESS, 2.

CHANGE OF REMEDY. See CONSTITUTIONAL LAW, 2.

CHECKS. See BILLS AND NOTES.
CHILDREN: Right to attend school. See SCHOOLS, 1.
CIRCUIT COURT. See JUSTICES OF THE PEACE, 2–4.
CITATION from county court. See WILLS, 4.
CIVIL COURT. See APPEAL, 1, 2, 8. COSTS. COURTS, 2, 3.
CLAIM AGENT. See EVIDENCE, 9.
CLAIMS.
Against county. See DRAINS, 4.
Against decedents. See EXECUTORS. GUARANTY, 2. PLEADING, 2. WILLS. WITNESSES.
CO-CONSPIRATORS. See CONSPIRACY, 4.
COLLATERAL SECURITY. See BILLS AND NOTES, 3.
COLLECTION OF TAXES. See DRAINS, 1.
COMBINATIONS. See CORPORATIONS, 2.
COMMERCIAL PAPER. See BILLS AND NOTES.
COMMISSIONER OF BANKING. See BANKS, 3.
COMMISSIONS. See BROKERS.
COMMON CARRIER. See AUTOMOBILES, 1. CARRIERS. COURTS, 1.
COMPENSATION for injuries. See WORKMEN'S COMPENSATION.
COMPLAINT. See CRIMINAL LAW, 1. GUARANTY, 5. NEGLIGENCE, 1. PLEADING.
CONDEMNATION. See INJUNCTION, 1.
CONFIDENTIAL COMMUNICATIONS. See INSURANCE, 3.
CONSOLIDATION OF ACTIONS. See CORPORATIONS, 8.

CONSPIRACY.

See CRIMINAL LAW, 10. HOMICIDE, 1.

Criminal responsibility: Nature of proof: Discretion of court.

1. In proving a conspiracy great latitude in the admission of evidence is permissible, and the limits thereof rest largely in the discretion of the trial court. *Bianchi v. State,* 75
2. Upon the question of conspiracy, evidence that some, if not all, of the defendants belonged to the same club or circle or home and as to its character is admissible; but proof that defendants were anarchists, or even that they were guilty of criminal anarchy, is not sufficient of itself to prove a conspiracy to murder. *Ibid.*

Same: Acts and intentions of one co-conspirator.

3. If in such a case the proof of conspiracy failed, letters written by one defendant showing an intent on his part and that of others to disturb the meeting at which the assault occurred were admissible in evidence only against the writer. *Bianchi v. State,* 75
4. Although defendants or some of them entertained the thought of disturbing such meeting, the execution of that thought would be only a misdemeanor, and those joining in it could

not on that ground be convicted of an assault with intent to murder unless the disturbance contemplated would probably lead to such an assault. *Ibid.*

CONSTITUTIONAL LAW.

Police power: Limitation. See TELEGRAPHS, 1.

1. The term "police power," in its limited sense, includes simply regulations for the protection of the lives, health, and property of citizens and the promotion of good order and good morals. *State ex rel. Blaine v. Wis. Tel. Co.* 198

Obligation of contracts: Change in remedy.

2. Changing the remedy by which a right under a contract is enforced does not impair the obligation of the contract. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 183

Equal protection of laws: Exclusive bidding at tax sales.

3. Sec. 1138*m*, Stats. 1917 (ch. 268, Laws 1917), providing that a county board may authorize the county treasurer to become the purchaser of lands sold for general taxes, is *held* to constitute the county treasurer the exclusive bidder at the tax sale of real estate which he is authorized to purchase. *State ex rel. Mason v. Larsen,* 298

4. As so construed, it denies to one taxpayer competitive bidding at the tax sale which it extends to another, and violates the provisions of sec. 1, amendm. XIV, Const. of U. S., guaranteeing the equal protection of the laws, as well as equivalent provisions of the state constitution. *Ibid.*

Vested rights. See ADJOINING LANDOWNERS, 3.

Self-incrimination. See CRIMINAL LAW, 2.

CONSTITUTIONS OF FRATERNAL ASSOCIATIONS. See INSURANCE, 9–16.

CONTEMPT OF COURT. See INJUNCTION. WITNESSES, 8.

CONTRACTS.

See BILLS AND NOTES. CORPORATIONS, 1, 2. LIMITATION OF ACTIONS, 2, 3. SALES. WORKMEN'S COMPENSATION, 4.

Nature and essentials: Meeting of minds. See VENDOR AND PURCHASER, 1.

1. The minds of the parties to a contract must meet upon the essential contents thereof. *Laney v. Ricardo,* 267

Same: Offer: Acceptance by mail.

2. One who makes a proposal to another to be answered by return mail, in the absence of a revocation, holds himself ready and willing to abide by it until acceptance or rejection can reach him by return mail. *Allen v. Wolf River L. Co.* 253

Validity. See BOUNDARIES. CARRIERS, 4. CORPORATIONS, 15. EXECUTORS, 1. FRAUDS, STATUTE OF. GUARANTY, 1. INSURANCE, 10. PAUPERS.

Validity of assent: Intoxication of one of parties. See DEEDS, 2.

3. One who, as a result of intoxication, has been deprived of his memory or judgment or rendered incapable of comprehending or appreciating the nature and effect of his act (in this case the execution of a deed), will be granted relief in equity against the consequences thereof, if the other party thereby obtained an unconscionable bargain. *Harlow v. Kingston,* 521

Same: Fraud on one of parties. See BROKERS, 3.

Legality. See GUARANTY, 1. LANDLORD AND TENANT, 4.

Construction. See CORPORATIONS, 5. CROPS, 1. EXECUTORS, 2, 3. INSURANCE, 1, 5. TRIAL, 4. TRUSTS, 3. WILLS, 1, 8.

Abandonment: Termination of contract on agreed conditions. See CROPS, 1, 2.

4. Ordinarily parties have the same right to agree that on certain conditions subsequently arising their contractual relationship shall cease as they have to agree on the terms and conditions which shall bind them. *Strander v. McIntosh,* 403

Action for breach: Architect's certificate as condition precedent: Waiver of requirement.

5. Where a contract to install a heating plant in defendant's building required the issuance of the architect's certificate before payment was due, the complaint in an action for the balance due should have alleged either that such a certificate had been issued or should have set forth facts showing that the certificate, though earned, had been fraudulently or mistakenly withheld. *Shine v. Hagemeister Realty Co.* 343

6. Where the complaint omitted such necessary allegations, and there was no demurrer, and neither party was misled, and evidence was introduced on the question of the refusal of the certificate and the reason therefor, and there was a full and fair trial, the judgment, in view of sec. 3072*m,* Stats., would not be reversed solely for such omission. *Ibid.*

Same: Excuse for delay in performance.

7. Where the contract of installation provided that it was to be performed "as fast as the general construction will permit," the evidence is *held* to justify the jury's finding that the contract was performed as soon as the general construction and attending circumstances would reasonably permit. *Shine v. Hagemeister Realty Co.* 343

8. In such case, statements by plaintiff and other contractors that steamfitters were scarce at the time and that men and supplies were hard to get, and that jobs of that kind were seldom completed on time, and that the work was done with customary speed, were incompetent, in view of the terms of the contract. *Ibid.*

9. Where the contract to install the heating plant authorized the architect to issue certificates for "work done and materials furnished upon the premises," manifestly not including the

power to determine whether plaintiff's delay caused the cement floor to break up, his refusal of a certificate solely on that ground was a mistaken refusal within the meaning of the law and excused plaintiff from producing the certificate as a condition to recovery of the balance due. *Ibid.*

10. The contention that the action should be dismissed because brought before the end of the thirty-day period during which final payment was to be made under the terms of the contract cannot prevail, that objection having been effectually waived by not setting up the fact in the answer and by totally denying liability and going to trial on the merits. *Ibid.*

Same: Duty to minimize damages. See DAMAGES, 1.

Performance. See SALES, 3.

Impairing obligation. See CONSTITUTIONAL LAW, 2.

Ratification. See VENDOR AND PURCHASER.

Change in remedy. See CONSTITUTIONAL LAW, 2.

CONTRIBUTION.

When arises between joint tortfeasors: Necessity of judgment. See INSURANCE, 5.

1. One of two joint tortfeasors, against whom a judgment has been rendered, upon being sued for contribution by the plaintiff, which as liability insurer of the other had paid the entire judgment, cannot limit the amount of recovery by showing that its co-tortfeasor had refused to join in a settlement, offered by the person against whom the tort was committed, for a less amount than the judgment, no right of contribution then existing and joint tortfeasors having no right to relieve themselves of liability as have co-obligors in a contract or judgment under sec. 4204, Stats. *Frankfort G. Ins. Co. v. Milwaukee E. R. & L. Co.* 533

2. The judgment recovered by the injured person against the defendant and another as joint tortfeasors, while not conclusive upon the defendant, was properly offered in evidence by the insurer in its action for contribution, and, there being no evidence tending to impeach it, the findings and undisputed evidence sustain the judgment in this case. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See APPEAL, 29. AUTOMOBILES, 2, 4, 5. HIGHWAYS, 2, 3. JUDGMENT, 2. NEGLIGENCE. NEW TRIAL, 1. STREET RAILWAYS, 14, 16, 18. TRIAL, 11.

CONVERSION. See BANKS, 6. BILLS AND NOTES, 1.

CORPORATIONS.

Sales of corporate stock on foreclosure: Purchase by certain stockholders to exclusion of others: Fraud. See FRAUD, 1–3.

1. A finding by the trial court to the effect that an agreement had been made whereby an intending bidder was induced to refrain from bidding at a foreclosure sale of corporate stock, is *held* to be against a clear preponderance of the evidence. *Schmitt v. Schmitt,* 28

2. An agreement or combination among prospective bidders, under which one is to bid for all at a public judicial sale of property, is not necessarily contrary to public policy if not made with intent to suppress competition or for any other fraudulent purpose; and where no fraud in fact results the sale should not be set aside, because of such agreement, at the suit of one who did not sustain any damage by reason thereof. *Ibid.*

3. The mere fact that plaintiff, who had an interest in corporate stock which was sold at a foreclosure sale, was deprived of such interest by the sale, does not show that an agreement among his former associates by which one of them was to bid in the stock for their joint benefit, thus eliminating plaintiff from the business, was fraudulent or unlawful. *Ibid.*

4. *Schmitt v. Franke,* 160 Wis. 347, which was an action for specific performance of the agreement above mentioned, is distinguished. The decision in that case is not binding in this case as being *res judicata,* because there is not identity of parties; nor is it binding under the doctrine of *stare decisis,* the evidence in the cases being materially different and there having been in that case a finding of fraud as a matter of fact. *Ibid.*

Sale of stock: Contract to retransfer: Specific performance.

5. Where the purchase of its stock by a corporation, the cancellation of the stockholders' indebtedness to the corporation, and an agreement that the sellers were to have, for three years, the option of repurchasing the stock at the price paid, were all parts of the same transaction, there was ample consideration to support the promise on the part of other stockholders, to whom the purchased stock was issued by the corporation, to keep the resale offer alive for three years. *Hoberg v. McNevins,* 486

6. The rights of the parties to the transaction having been established by what took place at a stockholders' meeting and not being dependent on the written contract, which, as made and partly performed, was taken out of the statute of frauds, evidence as to the oral transactions at the meeting was not inadmissible as tending to vary, affect, or change a written contract. *Ibid.*

7. The transfer by certain of the defendants to their spouses of the stock received by them did not put it beyond the power of the court to decree specific performance of their agreement to retransfer to the stockholders who sold. *Ibid.*

8. In separate actions for specific performance of a written agreement, the allowance by the court of separate bills of costs was not erroneous, there having been no consolidation and each action being of such a nature as not to permit the joinder of any of the defendants in the other actions and the rights of the plaintiffs being several and not joint. Nor does the situation come within the provisions of sec. 2919, Stats. *Ibid.*

Same: Option to repurchase: Waiver of objection: Statute of frauds.

9. Where a corporation purchased its own stock in consideration of the cancellation of the indebtedness of the sellers, such stock being later distributed as a stock dividend pursuant to an agreement between the corporation and the stockholders receiving the dividend, and certain of the stockholders signed an agreement to retransfer said stock to the original owners within three years for the price paid therefor, all who signed the agreement were bound thereby when all signed who it was understood were to sign. *Hoberg v. McNevins,* 486

10. The objections that there was no legal acceptance of the option to repurchase and that there was a failure in the description of the shares must be deemed to have been waived by the silence of the stockholders as to such points when demands were made upon them for retransfers of the stock and by their assertion of and their apparent reliance upon other grounds for refusal. *Ibid.*

11. The agreement was not void under the statute of frauds for uncertainty, as failing to specify the exact number of shares demanded from each of the purchasing stockholders. *Ibid.*

12. Where certain of the stockholders who had participated in the stock dividend agreed to retransfer the stock so received within three years at a stated price, but reserved the right to sell to others, such reservation did not nullify the right of the original owners to repurchase in the absence of the exercise of the right reserved. *Ibid.*

Treasury stock: Right of stockholder to purchase: Evidence.

13. Where only part of the stock of a corporation was issued, a purchaser of stock already issued takes with it the resulting right to take his proportionate share of any stock subsequently issued; but if he merely purchases unissued stock, he has no right to participate in any issue of stock made before his agreement to purchase was carried out. *Levy v. Sattler,* 308

14. In an action by a purchaser of corporate stock to declare the total amount of unlawfully issued stock less than the amount on the books, the evidence is *held* to warrant a finding that plaintiff's purchase was of unissued treasury stock and not of stock already issued. *Ibid.*

Authority of caretaker of property: Sale of real property.

15. In an action to recover commissions for the sale of real estate, where it was shown that one B., from whom plaintiff received his instructions to sell, was merely taking care of the property for the defendant corporation, but was not an officer thereof and had no authority to sell except to place the property in the hands of agents other than plaintiff, plaintiff is not entitled to commissions. *Cusick v. Worthington P. & M. Corp.* 509

Reports of agents: Admissions. See EVIDENCE, 4.

Managing officer. See BANKS, 6. BILLS AND NOTES, 1, 2. GUARANTY, 4, 5.

Trading-stamp companies. See TRADING STAMPS.

COSTS.

See APPEAL, 3, 4. CORPORATIONS, 8. COURTS, 2.

Motion fees on appeal to circuit court from civil court of Milwaukee county.

In an action instituted in the civil court of Milwaukee county and reversed in the circuit court on the defendant's appeal, it was not error to allow costs in the sum of $10 as motion fees on reversal of the judgment and also the costs incurred in the civil court. *Malkowski v. Graham,* 398

CO-TRUSTEE. See TRUSTS, 2, 3.

COUNTERCLAIM. See APPEAL, 33. EXECUTORS, 4. STIPULATIONS.

COUNTIES. See CONSTITUTIONAL LAW, 3, 4. DRAINS. TAXATION, 1, 6.

COUNTY TREASURER. See CONSTITUTIONAL LAW, 3, 4. DRAINS, 4.

COURT COMMISSIONER. See INJUNCTION, 1.

COURTS.

Authority of decisions of administrative bodies.

1. The question whether the business transacted by a railway company is that of a common carrier or a private carrier is a question of law, and courts are not bound by the decisions of administrative bodies in regard to constitutional and legal questions. The rule that findings of fact by the industrial commission must be upheld if supported by any substantial credible evidence is not applicable to such questions. *Waldum v. Lake Superior T. & T. R. Co.* 137

Jurisdiction: Over maritime injuries. See ADMIRALTY, 5.

Same: Over actions of school boards. See SCHOOLS, 3.

Same: Actions against sovereign states. See UNITED STATES, 1.

Determination by railroad commission as a condition precedent to action in court. See PUBLIC UTILITIES, 2.

Appeal from civil court of Milwaukee county to circuit court: Order or judgment?

2. Where, on appeal, the circuit court reverses a judgment of the Milwaukee civil court without granting a new trial, the proper judgment should, under sub. 5, sec. 28, ch. 549, Laws 1909, be entered in the circuit court and the costs taxed and inserted therein by the clerk of the circuit court. *Scheiderer v. A. George Schulz Co.* 6

3. An order of the circuit court, in such a case, reversing the judgment of the civil court and remanding the cause to the civil court for the entry there of judgment with costs, will be treated, on an appeal therefrom, as a judgment of the circuit court. *Ibid.*

Supreme court. See APPEAL AND ERROR.

Circuit courts. See COSTS. COURTS, 1–3.

County court. See INSANE PERSONS, 6. WILLS, 4.

CRIMINAL ANARCHY. See CONSPIRACY, 2. CRIMINAL LAW, 10.

CRIMINAL LAW.

Informations. See INDICTMENT AND INFORMATION.

Warrants: Examination of complainant: Record.

1. The clerk of the Milwaukee district court is authorized by sec. 9, ch. 218, Laws 1899, to issue warrants upon complaint filed in writing; and it is not necessary that the record show that the complainant was orally examined under oath, the calls of sec. 4776, Stats., being satisfied by a sworn complaint in writing. *Bianchi v. State,* 75

Evidence: Voluntary statements: Sworn statements: Harmless error.

2. Where certain of the defendants charged with an assault with intent to murder had been taken to the office of the district attorney and, without being advised of their constitutional rights as to self-incrimination, were sworn and examined by him, and their testimony reduced to writing, such proceeding was improper and illegal and such testimony, not having been voluntarily given, was inadmissible at the trial. *Bianchi v. State,* 75
3. No damaging facts as to the assault in question being contained in the statements, so taken, of two of the defendants, and it being shown by other evidence, clearly and satisfactorily, that they were active participants in the assault, the admission of their statements was not prejudicial error as to them. *Ibid.*

Limitation of evidence: Preliminary examination: Codefendants.

4. Transcripts of the testimony of police officers since deceased, taken at the preliminary examinations of defendants, were admissible in evidence at the trial, being received in each instance, as the trial court specifically stated, only as against those defendants at whose preliminary examination the offered testimony was taken; and a subsequent statement in the charge to the jury that such testimony could be considered only as against such defendants "as were present" at the times of such preliminary examinations was not, under the circumstances, misleading. *Bianchi v. State,* 75

Remarks of counsel: Restrictions on cross-examination.

5. Alleged errors as to remarks of counsel for the state in his argument to the jury, as to restrictions upon the cross-examination of witnesses for the state, and as to the attitude of the judge towards defendants' counsel during the trial, are *held* not to have been prejudicial. *Bianchi v. State,* 75

Plea of insanity: Special issue.

6. Where the record before this court contains nothing to indicate that, either before or at his trial, the defendant or his counsel had made any claim that he was insane at the time of the commission of an alleged offense, or that the trial court had any reason to suspect that such was the fact, it cannot be held that it was error not to submit to the jury a special issue as to insanity, under sec. 4697, Stats. *McVey v. State,* 72

Same: Review: Affidavit of counsel.

7. An affidavit of counsel for defendant, stating that before the trial he filed a plea of insanity with the clerk, which affidavit was not made a part of the record, cannot be considered in the appellate court. *McVey v. State,* 72

Change of venue: Review: Difficulty of securing a jury.

8. Four days before the time set for the trial in Milwaukee of persons charged with an assault with intent to murder, a bomb explosion in the central police station killed a number of persons, including two officers who had assisted in the arrest of the defendants at the time of the alleged assault. The newspapers of the city, which circulated generally throughout the state, charged the explosion, if not directly to the defendants (who were in jail), to their friends or nationality. A change of venue, asked on the ground that a fair trial could not be had in Milwaukee county, was refused conditionally. The request was not renewed upon going to trial, and a jury was quickly and easily secured. *Held,* that there was no abuse of discretion in refusing the change. *Bianchi v. State,* 75

9. The apparent difficulty or ease of securing a jury may be taken into account in passing upon an alleged abuse of discretion in refusing a change of venue. *Ibid.*

Review: Harmless error in instructions: Prejudicial error.

10. Upon a trial for assault with intent to murder, the evidence being insufficient to show a conspiracy and insufficient to show any offense by some of the defendants or more than a simple assault by others, it was error to give instructions to the jury relating to a conspiracy to commit a felony or relating to criminal anarchy as defined in the statutes. As to defendants whose active and deadly participation in the assault was clearly proved the error was harmless; but as to others, against whom the evidence was somewhat meager and uncertain, the error was prejudicial. *Bianchi v. State,* 75

Conviction and sentence: Discharge from custody. See HOMICIDE, 3.

Specific offenses.

Adultery. See ADULTERY.
Conspiracy. See CONSPIRACY.
Forgery. See FORGERY.
Fornication. See FORNICATION.
Homicide. See HOMICIDE.

CROPS.

Contracts for sale of crops: Conditions terminating contract.

1. Sec. 1670*n*, Stats. (ch. 55, Laws 1913), providing that the purchaser of a crop not ready for immediate delivery shall, when it is delivered, pay for its weight at contract price, "without regard to the quality or condition . . . at . . . time of delivery, unless any inferior quality or unsound condition . . . shall be due to the negligence or wilful act of the vendor," and giving

the seller the right to recover of the buyer double the contract price as damages on the buyer's refusal or failure to comply with his contract as required by the statute, is, whether considered penal or remedial, a statute requiring strict construction, when made the basis of a claim for double damages. *Strander v. McIntosh,* 403

2. Said sec. 1670*n* did not apply to a contract for sale and purchase, not of the whole of plaintiff's tobacco crop, but of certain definite grades or qualities out of his entire crop, leaving to the future agreement of the parties allowance for damaged tobacco, and providing that, if no such settlement were possible, the contract was to be canceled. *Ibid.*

CROSS-EXAMINATION of witnesses. See CRIMINAL LAW, 5.

DAMAGES.

See ADJOINING LANDOWNERS, 4, 5. ADMIRALTY, 5. APPEAL, 33. CARRIERS, 9. DEATH, 1, 2. FRAUD, 3, 4. LANDLORD AND TENANT. PUBLIC UTILITIES, 1. SALES, 11. TRIAL, 2.

Duty to minimize damages: Aggravation of damages.

1. Where one claiming damages for breach of a contract can minimize the damages he is obliged to do so and not unnecessarily increase them. *Lukens I. & S. Co. v. Hartmann-Greiling Co.* 350

Excessive damages: Personal injuries.

2. If, in an action for personal injuries, there was competent credible evidence which supports the jury's award of damages and is not overcome by evidence, facts, or circumstances which clearly show that less damages were sustained, the award must stand, especially where the trial court is satisfied that the jury was an intelligent and impartial one and acted without bias or prejudice, and has approved the award. Such an exercise of the discretion of the trial court will not be disturbed on appeal except for a manifest abuse of discretion. *Heindel v. Wis. T., L., H. & P. Co.* 181

3. This court declines in this case to disturb an award of $5,500, approved by the trial court, for injuries to a healthy girl of twenty-one years, who was at the time employed in domestic service, such injuries having resulted in traumatic neurosis which will either be permanent or will last a number of years, causing disability and much pain and suffering, and entailing large expenditures, both past and future, for doctor's bills, hospital expenses, etc. *Ibid.*

4. A verdict of $25,000, awarded to the plaintiff, about twenty-eight years of age at the time of the injury, who had been earning $780 a year and was studious, industrious, and ambitious, for an injury to his eyes resulting in medical expense, pain and suffering, diminished earning power and capacity for enjoying life, and necessitating added care by members of his family or others, was not excessive. *Bell v. Milwaukee E. R. & L. Co.* 408

5. An award of $500 damages is clearly reasonable in this case in view of the evidence. *Alshuler v. Milwaukee E. R. & L. Co.* 477

6. Where injuries to a young man twenty-one years old resulted in the loss of his left leg and the thumb of his left hand and a permanent scar on his face, included other injuries, not permanent, to his head and side, and greatly handicapped him if they did not wholly incapacitate him for the vocation for which he was best fitted, an award of $16,000 (reduced by the trial court from $20,000) is *held* not excessive. *Bassett v. Milwaukee N. R. Co.* 152

Same: Reduction by court.

7. Where the error, if any, in the admission of evidence bearing solely on the amount of damages, was more than offset by the trial court's reduction of the jury's award, the judgment will not be reversed for such error. *Bassett v. Milwaukee N. R. Co.* 152

Correction of damages found by jury to conform to proof. See TRIAL, 14.

Double damages. See CROPS, 1.

Punitory damages. See MALICIOUS PROSECUTION, 3.

Damages based on unlawful business. See LANDLORD AND TENANT, 4.

DEATH.

See APPEAL, 26, 29. INSURANCE, 16. RAILROADS. STREET RAILWAYS, 11, 18.

Death in military service. See INSURANCE, 4.

Damages to estate: Action by widow: Evidence.

1. In an action by a widow for the death of her husband, a finding of the jury that the damages to his estate, exclusive of pain and suffering, amounted to $4,000, are *held* not to be sustained by evidence showing that there was expended for medical attendance, nurses, and funeral expenses $779 and that the loss of wages by deceased prior to his death did not exceed $60. *Ehlers v. Automobile Liability Co.* 494

Same: "Damages to two persons."

2. Where damages to the deceased and his estate and also to the widow for her pecuniary loss under secs. 4255, 4256, Stats., were shown, it is *held* that there were "damages to two persons" within the meaning of the bond given under sec. 1797—63, conditioned for payment of damages not exceeding $2,500 to any one person or $5,000 for any one accident that may be recovered against a vehicle operator while in the service of a common carrier. *Ehlers v. Automobile Liability Co.* 494

DEBTOR AND CREDITOR. See APPEAL, 34. BANKS, 1, 2, 6. BILLS AND NOTES, 1, 2, 5. BROKERS, 3, 4. CARRIERS, 8. CONTRACTS, 9. DRAINS, 1, 3. EVIDENCE, 14. EXECUTORS, 8. FORGERY,

2. FRAUDS, STATUTE OF, 2. FRAUDULENT CONVEYANCES, 1. GARNISHMENT. GUARANTY, 2, 3. HUSBAND AND WIFE, 1, 2. INSURANCE, 5. LIMITATION OF ACTIONS, 1–3. NOVATION. PLEADING, 2. SALES.

DECEIT. See FRAUD, 4.

DEDUCTIONS, in inheritance tax. See TAXATION, 5, 6.

DEEDS.

Relief from deed executed: Right to relief: Intoxication: Inadequacy of consideration. See CONTRACTS, 3.

1. Where the grantor in a deed conveying his interest in certain land for an inadequate consideration had been grossly intoxicated for some time immediately prior to its execution, so that his thirst for liquor dominated his mind and rendered it abnormal and incapable of appreciating the effect of his act, equity will cancel the deed although the grantor was sober at the time of executing it. *Harlow v. Kingston,* 521
2. The grantor having conveyed his interest in the property, which the court found to be worth $1,388, for $200, the consideration was so inadequate as to entitle him to relief against the deed, although the interest conveyed was subject to the dower and homestead rights of his mother, who was then sixty-six years old. *Ibid.*

Deed of trust. See TRUSTS, 3.

DEFENSE. See BILLS AND NOTES, 3.

DELINQUENT TAXES. See DRAINS, 1.

DEMURRER. See CONTRACTS, 6. PLEADING, 1.

DISCOVERY. See BANKS, 4.

DISCRETION. See APPEAL, 1, 10, 12. CONSPIRACY, 1. CRIMINAL LAW, 9. DAMAGES, 2.

DISMISSAL OF ACTION. See APPEAL, 2. LANDLORD AND TENANT, 5.

DISPOSAL OF CASE. See HOMICIDE, 3.

DISTRICT ATTORNEY. See CRIMINAL LAW, 2.

DRAINS.

Collection of assessments: Penalties: Relation between county and district.

1. Under sub. 5, sec. 1379—25, Stats., the provisions of secs. 1090, 1112, and 1129 relating to penalties in the case of delinquent general taxes apply to the collection of drainage assessments. *State ex rel. Portage Co. D. Dist. v. Newby,* 208
2. The word "principal" in sub. (b) and sub. (c) of sec. 1379—25*a*, Stats., relating to drainage district accounts, includes, in addition to the amounts of the delinquent drainage assessments, the penalties of two and twelve per cent., above referred to, imposed by secs. 1090, 1112, and 1129; the word "face" in sub. (d) of sec. 1379—25*a* has the same meaning; and the word "interest" in said sub. (d) means the interest on the certificates from the date of the sale to the county up to the date of the deed. *Ibid.*

3. The penalties so added by law to delinquent drainage assessments belong to the drainage district, and not to the county. The county, in all its transactions relating to the collection of such assessments, acts in a trust capacity only for the benefit of the drainage district. *Ibid.*

Same: Remedy against county and county treasurer for withholding assessments collected.

4. Where the county treasurer has collected the penalties upon delinquent drainage assessments and still has the moneys in his possession, the proper remedy is by *mandamus* to compel him to turn such moneys over to their owner, the drainage district. Under such circumstances the district has no remedy against the county itself, and disallowance of a claim filed against the county for the moneys in the treasurer's hands is of no consequence. *State ex rel. Portage Co. D. Dist. v. Newby,* 208

DRUNKARDS. See INSANE PERSONS, 2.

EARNEST MONEY. See APPEAL, 34. BROKERS, 3.

EMINENT DOMAIN.

Property subject: Cities and villages: Highways through buildings.

Notwithstanding sec. 1347, Stats., extends the provisions of ch. 52, relating to highways and bridges in towns, to all parts of the state except where there are inconsistent provisions applicable to particular counties, towns, cities, or villages, the provisions of sec. 1263 (in said ch. 52), prohibiting the laying out of highways through buildings, etc., do not apply to villages. *Mueller v. Brotz,* 526

EMPLOYERS' LIABILITY. See WORKMEN'S COMPENSATION.

EPILEPTICS. See INSANE PERSONS, 1. MARRIAGE.

EQUAL PROTECTION OF THE LAWS. See CONSTITUTIONAL LAW, 3, 4.

EQUITY. See ADJOINING LANDOWNERS, 4. CONTRACTS, 3. CORPORATIONS, 7, 8. INJUNCTION, 1, 2. TRESPASS. TRUSTS, 1–3. UNITED STATES, 2, 4.

ESTATES OF DECEDENTS. See EXECUTORS. WILLS.

ESTOPPEL. See INSURANCE, 16. JUDGMENT, 2.

EVIDENCE.

Judicial notice: Reports of railway company to railroad commission.

1. Judicial notice is taken of the annual reports and the tariffs filed by a railway company with the railroad commission. *Waldum v. Lake Superior T. & T. R. Co.* 137

Same: Blow-out of automobile tire.

2. The court cannot take judicial notice that a blow-out of the front tire of an automobile running fifteen miles an hour could not cause the car to run into a ditch alongside the road. *Klein v. Beeten,* 385

Presumptions. See INSANE PERSONS, 5. NEGLIGENCE, 7.

Relevancy: Res gestæ: Admission by conductor: Report of accident.

3. A street railway conductor's report of an accident, made at the end of his run, nearly an hour and a half after the accident, was no part of the *res gestæ*. *Bell v. Milwaukee E. R. & L. Co.* 408

4. Such report was not admissible as an admission of a state of facts, or of negligence on the part of the defendant, for an agent of a corporation cannot make such an admission and such reports are made for the information of the principal and are often based largely upon statements of others to the agent. *Ibid.*

Same: Statements by conductor after accident.

5. Evidence that a street-car conductor, a few minutes after a collision with a pedestrian, stated that, since everything needful had been done for the injured person, in order to keep the car on time those wishing to go to destination might start, was properly excluded as not tending to show that the car was running at a high rate of speed. *Williams v. Duluth St. R. Co.* 261

Relevancy, materiality, and competency. See APPEAL, 34. BROKERS, 4. CONSPIRACY, 1, 4. CONTRACTS, 8. CRIMINAL LAW, 2, 4. DAMAGES, 7. DEATH, 1. EVIDENCE, 9–13, 16–19. EXECUTORS, 2, 3. INSANE PERSONS, 3, 6. INSURANCE, 3. MALICIOUS PROSECUTION, 1, 3. WITNESSES, 3–9.

Admissions: By party: Necessity of foundation for impeachment. See MALICIOUS PROSECUTION, 1.

6. Where the defendant in a negligence case makes admissions to third persons, they can be shown in evidence without laying a foundation in the nature of impeachment. *Klein v. Beeten,* 385

Same: Report to insurance company: Production.

7. In an action for injuries sustained by plaintiff when struck by defendant's automobile, wherein defendant, over objection, testified that he had notified the insurance company of the accident, the plaintiff had no legal right to have the report or notice produced for his inspection. *Kellner v. Christiansen,* 390

8. Evidence that defendant was protected by insurance against the liability complained of was immaterial to the merits of the controversy, and its admission was error. *Ibid.*

Same: Acts of co-conspirators. See CONSPIRACY. HOMICIDE, 1.

Same: By defendant before trial. See CRIMINAL LAW, 2, 3.

Hearsay: Testimony of agent based on physicians' reports: Statements of witnesses: Production.

9. In an action for injuries sustained by plaintiff while being ejected from defendant's passenger train, where plaintiff called defendant's claim agent at the trial as an adverse witness, who without objection gave the names of witnesses with whom he had talked and stated that he possessed written re-

ports by defendant's local physicians, his compelled testimony, based on such reports and interviews, that he understood that two of defendant's physicians had treated plaintiff and that he presumed that defendant had paid for such treatment was hearsay and inadmissible. *Lehan v. Chicago & N. W. R. Co.* 327

10. Statements of defendant's witnesses to its claim agent and written reports by defendant's local physicians, sought to be produced and used, either as of employees of defendant or of persons in no wise connected with it, were no part of the *res gestæ.* *Ibid.*

11. Nor were such statements admissible as tending to show notice to defendant of the happening of the event, there being no such issue in the case, or as being in the nature of declarations of any person who could thereby bind defendant. *Ibid.*

12. Such documents, then in the possession of defendant's claim agent, were not admissible as evidence in plaintiff's behalf, nor were they documents which the party holding them should be required to produce at the desire of the other party. *Ibid.*

13. On the evidence in this case and in view of the manner in which the trial was conducted, it is *held* that the verdict for plaintiff was the result of passion or prejudice and against the overwhelming testimony, and cannot stand. *Ibid.*

Parol evidence: Satisfaction of mortgage. See CARRIERS, 6. CORPORATIONS, 6.

14. The satisfaction of a mortgage, like an ordinary receipt, is open to explanation by parol evidence, and can thus be impeached. *Flanagan's Estate v. Flanagan's Estate,* 537

Same: Prior or contemporaneous oral warranties.

15. Evidence to show an oral warranty made prior to or contemporaneous with a written contract was inadmissible. *Northwestern Blaugas Co. v. Guild,* 98

Weight and sufficiency. See APPEAL, 13. BILLS AND NOTES, 5. CONTRACTS, 6. CONTRIBUTION, 2. CORPORATIONS, 1, 14. COURTS, 1. CRIMINAL LAW, 10. DAMAGES, 2. DEATH, 1. EXECUTORS, 1. FORGERY, 2. FRAUD, 4. HOMESTEAD, 2, 3. HOMICIDE, 2. HUSBAND AND WIFE, 1. MASTER AND SERVANT, 2. NEGLIGENCE, 3, 7. PHYSICIANS AND SURGEONS, 1. PUBLIC UTILITIES, 6. SALES, 7. STREET RAILWAYS, 12. TRIAL, 14.

Opinion evidence: Non-expert.

16. The opinion of a witness, given while testifying as to the speed of a street car, that the motorman used very good judgment, is *held* improper. *Williams v. Duluth St. R. Co.* 261

Same: By experts: Physicians: Treatment of patient.

17. The admission of the opinion of plaintiff's expert, who had examined plaintiff since his injury but who had never treated him, that plaintiff was totally blind in his left eye, based partly

upon examination and partly upon subjective symptoms or upon what plaintiff had told him, was error. *Bell v. Milwaukee E. R. & L. Co.* 408

18. A physician who treats a patient may give an expert opinion based upon the result of his examination and statements made to him by the patient; but one who does not so treat the patient cannot give such opinion. *Ibid.*

Same: Examination of expert: Scientific works.

19. Where defendant's expert, on cross-examination, made a qualified negative answer to a question as to whether he considered a named writer an authority on optic atrophy, a question to him as to whether he remembered having read certain language of such writer, which was then read by plaintiff's counsel, was error, as, under the guise of finding the witness's familiarity therewith, the contents of the work itself would thus be placed before the jury, in evasion of the rule that textbooks or scientific works cannot be read in evidence to the jury. *Bell v. Milwaukee E. R. & L. Co.* 408

Same: Correctness of applied tests: Question for jury.

20. In an action against a street railway company for injuries to plaintiff's eyes from an explosion of electric light lamps in one of defendant's street cars on which plaintiff was a passenger, caused by contact with defective trolley wires, the question of the correctness of the medical tests by defendant's experts, in view of plaintiff's own testimony that his vision was gone in both eyes, was for the jury. *Bell v. Milwaukee E. R. & L. Co.* 408

Judgments as evidence: Effect. See CONTRIBUTION, 2. EXECUTORS, 7.

EXAMINATION OF BANK. See BANKS, 3.

EXAMINATION OF WITNESSES. See APPEAL, 19. CRIMINAL LAW, 1.

EXCESSIVE DAMAGES. See DAMAGES.

EXCLUSIVE BIDDER. See TAXATION, 1.

EXECUTORS AND ADMINISTRATORS.

Claims against estate: Services rendered deceased: Express contract. See APPEAL, 14. GUARANTY, 2. LIMITATION OF ACTIONS, 1. PLEADING, 2. WILLS, 7. WITNESSES, 3.

1. The evidence in this case is *held* to sustain a verdict finding that there was a contract between a daughter and her deceased mother that the daughter should receive compensation for services rendered and disbursements made by her for the mother's benefit, and that such services were rendered and the disbursements made in reliance on the contract. *Nelson v. Christensen,* 373

2. In an action for personal services rendered a deceased, testimony of plaintiff that before she began her services with deceased her health was as near perfect as could be, and that at deceased's death she considered herself not only a physical but a mental wreck, was not competent and should not have been admitted. *McNaughton v. McClure,* 288

3. Error in permitting claimant to so testify was not prejudicial, where she recovered upon an express contract. *Ibid.*

Same: Filing of claim: Revival of pending action: Judgment in favor of claimant.

4. A claim against a decedent, based on notes given by him, was seasonably presented to the county court. The administrator objected to it on the ground that an action by the decedent involving the notes was pending in a federal court and, upon leave, had such action revived in his name. Subsequently, after the time limited for filing claims against the decedent, the claimant filed an amended answer in the federal court in which, for the first time, he set up the notes as a counterclaim. Judgment in that court was rendered against the administrator on the notes, and thereafter the county court, without further proof than a copy of that judgment, allowed the claim at the amount fixed by the judgment. *Held,* that the claim, being upon the notes and not upon the judgment, and having been duly filed, never became barred. *Estate of Gillen,* 58

5. The claim on the notes, not being barred, was properly interposed as a counterclaim in the federal court after the revival of the action. *Ibid.*

6. The judgment in the federal court was conclusive proof as to the validity of the notes and the amount due thereon. *Ibid.*

7. Such judgment was not a new or independent claim to be allowed in the county court, but was merely an evidentiary fact in support of the original claim on the notes. *Fields v. Estate of Mundy,* 106 Wis. 383, distinguished. *Ibid.*

Same: Claim filed against estate of stockholder of insolvent bank.

8. Where, after creditors have recovered judgment in an action instituted by them under sec. 3223, Stats., to enforce the liability of stockholders of an insolvent bank under sec. 2024—44, one of them files a claim for judgment recovered by him in such suit against the estate of a deceased stockholder liable under the judgment, his claim against the estate is for the benefit of all the creditors, and they have a right to share in the amount he recovers in proportion to their rights as fixed by the judgment rendered in the creditors' action. *Dietrich v. Estate of Loney,* 469

Appeal to circuit court: Interest on reversal.

9. The amount recoverable in the circuit court on appeal from the county court's disallowance of a claim against the estate of a decedent is subject to the legal rate of interest from the time of the disallowance. *Nelson v. Christensen,* 373

EXEMPTION from execution. See FRAUDULENT CONVEYANCES, 2.

EXPERT TESTIMONY. See EVIDENCE.

EXPULSION from school. See SCHOOLS, 4.

FALSE REPRESENTATIONS. See FRAUD.

FEDERAL ESTATE TAX. See TAXATION, 5.

FELLOW-SERVANTS. See MASTER AND SERVANT, 1.

FINDINGS OF FACT. See APPEAL, 16, 17. BROKERS, 4. CONTRIBUTION, 2. CORPORATIONS, 1, 14. FORGERY, 2. TRIAL, 15.

In actions to review order of railroad commission. See PUBLIC UTILITIES, 8.

By industrial commission. See COURTS, 1.

FIRE INSURANCE. See INSURANCE.

FORECLOSURE. See CORPORATIONS, 1.

FOREIGN COMMERCE. See CARRIERS, 6.

FORFEITURE of earnest money. See BROKERS, 3.

FORGERY.

Intent: Imitation of signature: Evidence.

1. The fact that no attempt was made to imitate an employee's signature, claimed to be forged, is not conclusive, it being sufficient under secs. 4454, 4455, Stats., if there was an intent to injure or defraud. *Schmidt v. State,* 575
2. The inferences of fact to be drawn from the evidence as to whether a bank account belonged to the defendant or to an employee in whose name the deposit was made, being in dispute, a finding by the court that the defendant committed a forgery in drawing a check on the account and signing the employee's name thereto is sustained. *Ibid.*

FORNICATION.

Nature of offense. See ADULTERY, 2.

Fornication, although cognizable in England under the ecclesiastical law, was not punishable as a common-law offense unless accompanied by such circumstances as to render it a public nuisance. *State v. Roberts,* 570

FRANCHISES. See MUNICIPAL CORPORATIONS, 1. PUBLIC UTILITIES, 1. STREET RAILWAYS, 3.

FRATERNAL BENEFIT SOCIETIES. See INSURANCE.

FRAUD.

See APPEAL, 13. BILLS AND NOTES, 1–3. BROKERS, 3. CONTRACTS, 5. CORPORATIONS, 1, 2. FORGERY, 1, 2. GUARANTY, 4. INSURANCE, 2.

False representations: Statements of facts or opinion: Reliance.

1. In an action based on false representations whereby plaintiff was induced to buy an interest in a corporation manufacturing knit underwear, although plaintiff participated in the taking of an inventory of the property of the company more than ten days before he parted with his money in making the purchase, findings by the jury to the effect that he did not have opportunity to observe and learn the condition and value of the machinery of the company and to find out for himself whether or not the business was profitable, and that he was justified in relying upon defendants' representations as to

those matters, are *held* to be sustained by evidence showing that plaintiff had never had any experience with machinery and knew nothing about the knitting or underwear business or about books of account. *Swoboda v. Rubin,* 162

2. Opportunity to ascertain the truth of representations by the seller as to the value of property includes not only the element of time but also competency or capacity of the purchaser to form an intelligent judgment on the subject. *Ibid.*

3. The substance of a transaction being the sale by two persons of a one-third interest in the property of a corporation controlled by them, the mere fact that they and the purchaser organized a new corporation, to which the property was transferred, said purchaser paying for one third of the stock of the new corporation, did not affect the right of the purchaser to recover damages on account of fraudulent representations, made by the sellers, which induced his purchase. *Ibid.*

Same: Damages: Sufficiency of evidence: Disposal of case.

4. In an action for deceit, because of uncertainties resulting from failure to return certain exhibits with the record, the supreme court is unable to determine whether the verdict upon the question of damages is supported by the evidence; and the cause is remanded for the entry of judgment in the trial court for such damages as are sustained by the evidence, not exceeding the amount found by the jury. *Swoboda v. Rubin,* 162

FRAUDS, STATUTE OF.

See CORPORATIONS, 6, 11. WILLS, 2.

Leases for a period longer than a year: Expiration of period: Tenancy from year to year.

1. Although an oral agreement under which defendant was to occupy substantially the entire basement of plaintiff's building, a portion of which was occupied under a prior parol agreement at a monthly rental, was void under sec. 2302, Stats., being for a term of about seven years at an annual rental, yet, where defendant occupied the entire basement under the later agreement and paid the agreed rental for over a year, a tenancy from year to year was created under sec. 2187, and defendant could not by notice terminate such tenancy until the expiration of the year. *Rundle-Spence M. Co. v. Badger-Packard M. Co.* 513

Agreements to devise real property.

2. A mother's oral contract to devise realty in consideration of services and disbursements by the daughter for her benefit is void. *Nelson v. Christensen,* 373

FRAUDULENT CONVEYANCES.

Bulk sales law: Liability of purchaser: Garnishment: Exempt property.

1. Where, without compliance with the bulk sales law (sec. 2317*c* *et seq.*, Stats.), a stock of goods and the fixtures were sold, together with a lease of the building, for $650, the stock and

fixtures being worth $125, and on orders of the court and an execution the purchaser paid $534.36 to creditors of the seller, he could, on garnishment by a creditor of the seller, be held liable for the balance of $115.64 which he had turned over to the seller, it not appearing that it was not part of the purchase price of the goods and fixtures. *Leidersdorf v. Kress,* 484

2. On the record in this case, the proceeds of the sale were not exempt from garnishment. *Ibid.*

GAMBLING TRANSACTIONS. See BILLS AND NOTES, 4. GUARANTY, 1.

GARNISHMENT.

See FRAUDULENT CONVEYANCES.

Judgment against principal defendant: Proof.

That a prior judgment had been entered against the principal defendant, necessary to authorize judgment against the garnishee in the circuit court, is sufficiently shown by the record, the facts being stipulated, and the return of the justice of the peace to the circuit court, showing entry of such judgment, being made part of the stipulation. *Leidersdorf v. Kress,* 484

GIFTS. See TAXATION, 7. WILLS, 9.

GOVERNMENTAL CAPACITY. See APPEAL, 26. MUNICIPAL CORPORATIONS, 2.

GOVERNMENTAL OPERATIONS. See UNITED STATES.

GRADING OF STREETS. See MUNICIPAL CORPORATIONS, 7.

GROSS NEGLIGENCE. See RAILROADS.

GUARANTY.

See BANKS, 1, 2.

Validity: Guaranty of future business: Gambling transactions.

1. A contract by which defendants agreed to enter upon a trade-increasing contest for which the prizes, plans, and advertising matter were to be furnished by one P., and to pay him $298 therefor, and he guaranteed that their sales of goods for the next year's business should equal a certain sum and that if 0.75 per cent. of such sales did not amount to $298 he would pay the deficiency in cash, was not illegal or void under sec. 4538, Stats., as being a gambling or wagering transaction; and a note given by defendants to P. for said $298 was therefore valid and enforceable by a holder in due course. *Stevens v. Freund,* 68

Construction: Direct promise by guarantor to pay: Failure to proceed against principal debtor.

2. An action upon a written guaranty having been commenced against two guarantors during the lifetime of one of them, and revived against his executors after his death, the cause of action based upon the indebtedness of the other guarantor to a bank was not barred by the failure to present it as a claim against the estate of the deceased guarantor within the time limited for the filing of claims by creditors. *Mitchell St. State Bank v. Froedtert,* 120

3. The guaranty in suit, being a direct promise by the guarantors to pay, is not within the rule governing guaranties to pay if the principal debtor fails to do so. *Ibid.*

Release of guarantor: Fraud of creditor: Evidence.

4. The defendant E., as manager of two lumber companies, was permitted to and did conduct and control their business affairs as though he were the sole owner. With F., another stockholder, he executed a so-called contract of guaranty whereby they jointly and severally agreed to pay to the plaintiff bank all loans and liabilities of every kind then owing or which might thereafter become due or owing by either of said companies or by E. In an action upon such contract to recover sums loaned or advanced by the bank upon notes, or renewals thereof, executed by E. in the name of one or the other of said companies, although it appeared that during the period covering the transactions in question E. was a director and, a part of the time, president of the plaintiff bank, that he was misappropriating some of the funds of the companies, and that some of their funds—not, however, proceeds of the notes in question—were received from him, as loans or otherwise, by the plaintiff's cashier personally, findings by the trial court to the effect that plaintiff was not chargeable with complicity or connivance with E. in his frauds upon the companies in connection with any of said transactions, and was not guilty of negligence in respect thereto such as to amount to a fraud on its part upon the companies or upon said F., are *held* to be supported by the evidence. *Mitchell St. State Bank v. Froedtert.* 120

Same: Fraud of one of two co-guarantors: Personal liability.

5. Even if E. received to his own use proceeds of the notes of the lumber companies, his personal liability is covered by the guaranty sued on; and all the facts necessary to show such liability having been proved at the trial without objection and being substantially undisputed, it is immaterial that such personal liability was not specifically pleaded in the complaint. *Mitchell St. State Bank v. Froedtert,* 120

GUARDIAN AD LITEM. See ACTION. JUDGMENT, 2.

GUARDIAN AND WARD. See INSANE PERSONS, 3.

HEARSAY EVIDENCE. See EVIDENCE, 9.

HIGHWAYS.

Laying out. See EMINENT DOMAIN.

Injuries from defects or obstructions: Sufficiency of track for travel: Evidence.

1. The evidence in this case—showing or tending to show, among other things, that while plaintiff was driving at dusk upon a highway which was defective by reason of stumps and roots therein, unevenness of the ground, and the zigzag course of the traveled track and its proximity to a fence, his wagon struck a stump and he was thrown to the ground and injured; that he was at the time standing on one side of a hayrack, over

the front wheel, so as to be able better to see the course of the track and the stumps and obstructions; and that the horses were walking slowly—is *held* not to show contributory negligence as a matter of law. *Nicks v. Marshall,* 24 Wis. 139, and *Raymond v. Sauk Co.* 167 Wis. 125, distinguished. *Hakes v. Pine Grove,* 214

2. Even if there was another traveled track within the limits of the highway it was not contributory negligence as a matter of law for plaintiff to use the regularly traveled track at the place of the accident; and it was not prejudicial error to refuse to submit in the special verdict questions as to whether the town had provided another and reasonably safe track for public travel within the limits of the highway, especially as the great weight of evidence showed that there was no such track and, under the charge of the court, the jury so found, in effect, in answering another question. *Ibid.*

Same: Contributory negligence: Knowledge of defective condition.

3. One knowing the defective condition of a highway may nevertheless use it, even after dark, without being guilty of contributory negligence as a matter of law. *Hakes v. Pine Grove,* 214

Use: Law of the road. See AUTOMOBILES.

HOLDER IN DUE COURSE. See BILLS AND NOTES, 4.

HOMESTEAD.

Nature and creation of estate or right: Using premises as saloon property.

1. To make land exempt as a homestead before a lien attaches, there must have existed on the part of the owner an intention in good faith to occupy the premises as a homestead prior to the time when the lien attached, which intention must have been evidenced by some overt act indicating a purpose to make the premises a homestead. *State Bank of Waupun v. Storm,* 295
2. Where the owner of land, with premises used as a saloon, left his former residence and moved onto such premises, the fact that he discharged his bartender, who had formerly managed the saloon, required the bartender to move from the premises so as to make room for his family, and took over the business, though his family, because of illness, could not leave their former residence, was an overt act and sufficient evidence of intention to make the property his homestead. *Ibid.*
3. The fact that the owner took out a license for a saloon to be conducted on the premises is entitled to some weight upon the question whether he intended to make such premises his homestead. *Ibid.*

Selection by husband. See BOUNDARIES.

4. A husband, owner of the town lot upon which he and his wife live and which exceeds one quarter of an acre in area, is competent to select the portion of the lot to constitute the homestead. *Behrend v. Buchmann,* 242

HOMICIDE.

Assault with intent to murder: Proof of conspiracy.

1. Upon the trial of several persons for an assault with intent to murder, a conspiracy on the part of all to make the assault may be shown. If such conspiracy is established it becomes a matter of secondary importance just what part each defendant took in carrying it out; but if it is not established, and there was no concert of action agreed upon or understood before the assault began, it is of the utmost importance to determine just what each defendant said and did at the time of the assault. *Bianchi v. State,* 75

Same: Sufficiency of evidence: Sentence and punishment.

2. The evidence in this case is *held* insufficient to establish a conspiracy to murder; insufficient as to some of the defendants to show that they took part at any time in any assault whatever; insufficient as to others to warrant a conviction of anything more than a simple assault; and sufficient as to others to warrant, in the absence of prejudicial error on the trial, their conviction of an assault with intent to murder. *Bianchi v. State,* 75
3. The evidence as to certain defendants having been sufficient to warrant conviction of a minor offense only, and they having been in fact convicted of a graver charge and imprisoned under harsher conditions and for a much longer time than they could have been had they been convicted of the lesser offense, it is *held* that they have been sufficiently punished, and upon reversal of the judgment against them their discharge is directed. *Ibid.*

HUSBAND AND WIFE.

See APPEAL, 14. BOUNDARIES. CORPORATIONS, 7. HOMESTEAD, 4. INSURANCE, 3. LIMITATION OF ACTIONS, 2. PHYSICIANS AND SURGEONS. WITNESSES, 6.

Separate estate of wife: Agency of husband: Liquor license.

1. In an action upon a promissory note executed by husband and wife, but which the wife claimed was executed by her as surety only, the evidence is *held* to sustain findings by the jury to the effect that the husband was the agent of the wife in obtaining the loan, that her separate property received the benefit of the money so obtained, that said money was necessary and convenient for the use and enjoyment of her separate estate, and that she authorized her husband to withdraw funds deposited to her credit in the plaintiff bank. *Citizens State Bank v. Cayouette,* 192
2. The use of the borrowed money to procure a liquor license so as to keep the wife's property as saloon property under the Baker law (chs. 188, 484, Laws 1907; sec. 1565*d*, Stats.) was a benefit or understood to be a benefit to her separate property. *Ibid.*

IMPEACHMENT.

Of witnesses. See APPEAL, 19. EVIDENCE, 6. WITNESSES, 1.

Of mortgage satisfaction. See EVIDENCE, 14.

IMPLIED WARRANTY. See SALES, 10.

INADEQUACY OF CONSIDERATION. See DEEDS, 2.

INCOMPETENTS. See INSANE PERSONS, 2.

INDEMNITY BONDS. See AUTOMOBILES, 1. INSURANCE, 5. PLEADING, 3.

INDEPENDENT CONTRACTOR. See MUNICIPAL CORPORATIONS, 5.

INDICTMENT AND INFORMATION.

Complaint: Different offense than charged in warrant.

Under sec. 4653, Stats., an information may be filed for an offense different from that charged in the complaint upon which a warrant was issued. *Bianchi v. State,* 75

INDUSTRIAL COMMISSION. See COURTS, 1.

INFANTS. See ACTION. JUDGMENT, 2. NEGLIGENCE, 3. SCHOOLS.

INFORMATION. See INDICTMENT AND INFORMATION.

INHERITANCE TAX. See TAXATION.

INJUNCTION.

See ADJOINING LANDOWNERS, 4. TRESPASS. UNITED STATES, 2, 4.

Violation: Effect of dissolution and motion to review: Duration of restraining order.

1. After condemnation proceedings to widen a village street, a circuit court commissioner issued an order restraining defendants from entering upon plaintiff's premises, and later this order was dissolved by the commissioner, whose action was sustained by the circuit court. *Held,* that the fact that a request for a stay of proceedings was incorporated in a notice of motion to have the dissolving order reviewed by the circuit court did not render the defendants guilty of contempt in entering upon plaintiff's premises, there being no injunctional order in force. *Mueller v. Brotz,* 526

2. A restraining order pending an application for an injunction ceases to be operative at the expiration of the date fixed by the order. *Ibid.*

INSANE PERSONS.

See CRIMINAL LAW, 6.

Disability: Epileptics.

1. One may be an epileptic without being insane. *Estate of Jansa,* 220

Same: Incompetency in business affairs.

2. A man may be sane in the sense that it is not necessary to incarcerate him in an asylum, and yet be incompetent to manage his estate, even though he be not a spendthrift or a drunkard. *Guardianship of Farr,* 451

Same: Evidence: Condition of estate.

3. In determining the question whether a person is competent to manage his estate, the status of the estate at the time may properly be taken into account. *Guardianship of Farr,* 451
4. Allowances made in this case to the guardian of an incompetent and to his attorney, the services of both of whom were much increased by the ward's conduct and litigation, are *held* reasonable. *Ibid.*

Adjudication: Effect: Subsequent adjudication in another court.

5. An adjudication that a person is sane at a given time is not conclusive, but has a probative effect only, upon the question whether he was sane twenty-three months thereafter. *Guardianship of Farr,* 451
6. Where in the county court of the county in which a person resided a guardian of his person and estate was appointed on the ground that he was incompetent, a subsequent adjudication that he is sane, made in another county, does not directly affect the status of or terminate such guardianship. *Ibid.*

INSTRUCTIONS TO JURY. See TRIAL, 1–3.

INSURANCE.

See APPEAL, 24. CONTRIBUTION, 1, 2. EVIDENCE, 7. NEW TRIAL, 2, 3. PLEADING, 3.

Construction of contract: Against insurer.

1. All conditions or exceptions limiting the liability of an insurer must be construed most strongly against the insurer, who prepared the contract and for whose benefit they were inserted. *Kelly v. Fidelity Mut. L. Ins. Co.* 274

Avoidance of policy for misrepresentation: Question for jury: Confidential communication to physician.

2. In an action on a life insurance policy, the question whether insured's father was afflicted with cancer, contrary to the statement of insured in his application, and in fact died of cancer, is for the jury. *McGinty v. Brotherhood of Railway Trainmen,* 366
3. In such an action the court properly refused to permit a physician to testify that he told insured's mother that her husband had cancer, the mother having testified that the physician made no such statement; for the physician's knowledge in this respect constituted a communication the confidential nature of which could be waived by no one except insured's father himself, and the physician could not thus be permitted to testify indirectly as to matters concerning which he could not testify directly. *Ibid.*

Risk and cause of loss: Military service: Death behind firing lines.

4. A provision in a life insurance policy limiting the liability of the insurer to the return of premiums if the insured engaged in military service and died as a result thereof, directly or indi-

rectly, does not limit liability for all deaths in the military service, but only for such as are due to some cause peculiar to the service, and the beneficiary can recover the full amount for the death of the insured in a motorcycle accident while he was in the military service, far behind the firing lines. *Kelly v. Fidelity Mut. L. Ins. Co.* 274

Liability of insurer: Indemnity contracts: Subrogation to insurer: Contribution.

5. Where a policy of insurance was an indemnity policy containing an express subrogation clause, and the insurer paid the whole of a judgment rendered against the assured and a codefendant jointly, the insurer had the same right against the codefendant that the assured would have had upon discharging the judgment, although the right of contribution did not arise until the payment was made. *Frankfort G. Ins. Co. v. Milwaukee E. R. & L. Co.* 533

Notice and proofs of loss: Waiver of notice: Pleading.

6. Sub. 5, sec. 1946*i*, Stats., providing that proofs of loss shall not be made under fire insurance policies unless immediate notice of the fire be given to the chief of the fire department or to the state fire marshal, does not preclude an insured who did not give such notice from suing, at least where the defendant insurer failed to reject the proofs for the specific reason that the statute had not been complied with. *Menting v. Germania Fire Ins. Co.* 246

7. Denial by the insurer that the insured had fulfilled all the policy conditions or that the proofs of loss conformed to the policy is not a plea that the insured had failed to give the notice required by sub. 5, sec. 1946*i*. *Ibid.*

8. Where the failure of the insured to give immediate notice of the fire as required by sub. 5, sec. 1946*i*, would have only abated the suit against the insurer because prematurely brought, the objection that such notice was not given does not go to the merits and must be raised by special pleading. *Ibid.*

Benefit societies: Internal affairs: By-laws subsequently enacted.

9. A controversy as to contract rights between a fraternal benefit association and a beneficiary is not an internal affair of the corporation with reference to which the decisions of its tribunals can be made conclusive. *Sweet v. Modern Woodmen,* 462

10. Thus, a by-law of a fraternal benefit association providing that the disappearance of a member for any period short of his life expectancy should not entitle the beneficiary to recover on the certificate, substantially changed the contract, and could not apply to a certificate theretofore issued, though the insured had agreed that laws thereafter enacted by the association should become a part of the contract. *Ibid.*

Same: Expulsion of members: Rules and procedure: Trial.

11. Voluntary unincorporated fraternal administrative orders such as the defendant in this case have a right to prescribe any

reasonable grounds for the expulsion of members; courts will not look into the technical correctness of either the proceedings prescribed or the proceedings followed; and any reasonable or permissible construction which such an order gives to its own constitution, laws, or rules will govern unless clearly subversive of personal or property rights. *Callahan v. Order of Railway Conductors,* 43

12. A law of the defendant order providing for expulsion of any member "who by verbal or written communication to the railroad officials or others interferes with a grievance that is in the hands of a committee" applies to all grievances actually in the hands of a committee and considered so to be by the committee itself and by all parties interested, regardless of mere technical defects in the manner of the appeal by which they came before the committee. *Ibid.*

13. A member who did not, in any of his several trials for interference with a grievance actually in the hands of a committee, make any claim that the matter was not lawfully before the committee at the time of such interference, cannot in an action for damages for his alleged unlawful expulsion be heard to question the regularity of the appeal to the committee. *Ibid.*

14. The constitution of the defendant order authorized the president to "interpret all laws of the order, subject to appeal to the next session of the grand division." A law gave him power to annul any trial before a subordinate division and to remand the case for a new trial either to "the division having original jurisdiction" or to any one of the three divisions nearest thereto. A ruling by the president that upon the annulment of a second trial in a division other than that in which the first trial was had, the case might be sent back for a third trial to any one of the three divisions nearest to that in which the second trial took place, was acquiesced in by the grand division. *Held,* that such ruling interpreted in a permissible way the words "original jurisdiction" and hence became a law of the order. *Ibid.*

15. Under sec. 32 of the laws of the order, relating to trial of members, when the president annulled an acquittal the case must be sent to a subordinate division for retrial; and when he affirmed a conviction the case must be sent to the board of directors, and the decision of that board was made final. Another section gave a right of appeal to the grand division from the decision of the president, "except as provided in" said sec. 32. *Held,* that no appeal lay to the grand division from a decision of the president annulling an acquittal and sending the case to a subordinate division for retrial. *Ibid.*

Same: Requirement that beneficiaries be in good standing: Waiver: Death benefit.

16. Under the by-laws of a subordinate typographical union a death benefit was payable to heirs upon the death of a member *in good standing,* but a member was in good standing only when his dues for the current month were paid. The general laws

of the order provided that a member should stand suspended when four months in arrears for dues. A member had once or twice been more than four months in arrears, but, before it was necessary for the local secretary to report that fact, had paid sufficient dues to maintain his membership, and the report was not made. He had usually been from two to three months, and at the time of his death was two months, in arrears. The local officers were bound to accept dues tendered by a member not in suspension, even though he was in arrears. *Held,* that no death benefit was payable. His mere membership in the order was not enough to give his heirs any right to such benefit; and, even if there had been a waiver of the laws which automatically operated to suspend him as a member of the order, there had been no conduct which in any way estopped the local union to deny that he was in good standing. *Ramsey v. Travelers' P. Asso.* 147 Wis. 405, distinguished. *Stehlik v. Milwaukee T. Union,* 65

INTEREST. See EXECUTORS, 9.

INTERSTATE COMMERCE. See CARRIERS, 7.

INTERURBAN RAILWAYS. See PUBLIC UTILITIES, 1. STREET RAILWAYS, 8.

INTOXICATING LIQUORS. See HOMESTEAD, 2. HUSBAND AND WIFE, 2.

INTOXICATION. See CONTRACTS, 3. DEEDS, 1, 2. TRIAL, 11.

JOINDER of defendants. See CORPORATIONS, 8.

JOINT TORTFEASORS. See CONTRIBUTION, 1, 2. INSURANCE, 5.

JUDGMENT.

See APPEAL, 1, 4, 20. COSTS. EXECUTORS, 4, 8. INSURANCE, 5. JUSTICES OF THE PEACE, 1.

Opening or vacating: Judgments during term: Affidavit excusing default. See APPEAL, 12.

1. Where it appears from an affidavit made by defendant that she supposed her attorney would appear and protect her interest in a pending action, but that inadvertently he failed to do so and judgment was entered by default, and that she is advised by her attorney, after a full statement of the facts to him, that she has a valid defense to the action as set out in the verified answer, the court did not abuse its discretion in opening the default during the term. *Sawicki v. Wulff,* 377

Judgment on reversal: Form. See COURTS, 2.

In garnishment actions: Offer in evidence. See GARNISHMENT.

Conclusiveness of adjudication: Identity of parties: Action by guardian ad litem: Res adjudicata: Stare decisis.

2. A judgment dismissing a former action by a minor child in which he appeared by his mother as his guardian *ad litem* and in which the jury found him guilty of contributory negligence, was not binding, under the doctrine of *res judicata,* in an action by the mother; nor could the verdict in such former action be held to operate as an estoppel, on the principle of

stare decisis, where the evidence in that action was not before the court in the later action. *Scheiderer v. A. George Schulz Co.* 6

Same: Decree of foreign court: Probate of will. See WILLS, 3.

Joint tortfeasors: Right to contribution. See CONTRIBUTION, 1, 2.

JUDICIAL NOTICE. See EVIDENCE, 1.

JUDICIAL SALE. See CORPORATIONS, 1–4.

JURISDICTION. See APPEAL, 1. WORKMEN'S COMPENSATION, 9, 10.

JURY. See APPEAL, 13, 15. CRIMINAL LAW, 8. NEW TRIAL, 1.

JUSTICES OF THE PEACE.

Appeal to circuit court: Jurisdiction of municipal court: Constitutionality: Defective appeal. See APPEAL, 5–7.

1. An action in a justice's court of Outagamie county wherein judgment was rendered for the defendant for costs only was not an action "where the amount of damages or value of property recovered, exclusive of costs, [did] not exceed fifty dollars," within the meaning of sec. 39, ch. 23, Laws 1907, which limits appeals in such actions to the municipal court of the county. The class of actions so described was intended to be confined to cases in which *some* damages or property is recovered. *Zeh v. McCormick,* 238
2. Appellate jurisdiction in certain cases appealed from the justices' courts in a county may be vested in the municipal court of the county, to the exclusion of the circuit court. *Ibid.*
3. Where, under sec. 39, ch. 23, Laws 1907, an appeal from a justice's judgment was authorized either to the circuit court or to the municipal court of Outagamie county at the election of the defendant (the successful party), and plaintiff appealed to the circuit court and return was duly made to that court, the defendant, under sec. 2836*a*, Stats., waived all objections to the jurisdiction of that court over person or subject matter by appearing therein and procuring a continuance before objecting to its jurisdiction. The words "subject matter" in said sec. 2836*a* are used in the narrow sense as meaning the subject matter of that particular lawsuit. *Ibid.*
4. Where, in such case, the plaintiff so appealing desired a trial *de novo,* but inadvertently omitted at the time to file an affidavit, under sub. (2), sec. 3768, Stats., that he had a valid claim exceeding $15, the appeal was defective within the meaning of sec. 2836*a*, Stats., and the circuit court thereafter properly allowed such affidavit to be filed. *Ibid.*

LANDLORD AND TENANT.

Oral leases. See FRAUDS, STATUTE OF, 1.

Premises demised: Boundaries: Designation by lessor.

1. Where a lessor points out to a prospective lessee the boundaries of land which he is leasing, the lessee is entitled to rely thereon, and the lessor must point them out correctly under

penalty of responding in damages to the lessee; and the latter, as against the lessor, is not charged with notice of the visible possession of a part of the land by a third person. *Kremsreiter v. Boddenhagen,* 515

Same: Damages upon partial eviction: Prospective profits: Profits made on Sunday.

2. Lessees of land for use as a baseball park and an athletic field, who were compelled in a suit against them and their lessor by an adjoining landowner to remove a fence around part of such field, can recover as damages from the lessor the difference between the rental value of the premises as represented and as they actually were. *Kremsreiter v. Boddenhagen,* 515
3. Such lessees cannot recover damages against their lessor for loss of use of the property for baseball and athletic purposes, due to the removal of the fence, where the use for baseball purposes was given up during the first season and no attempt was made to use it for other athletic purposes. *Ibid.*
4. Nor can such lessees recover damages against their lessor for loss of the use of the premises for baseball purposes, based upon profits made on Sunday, in violation of sec. 4595, Stats. *Ibid.*

Actions on lease: Unlawful detainer: Tender of rent due and costs: Effect.

5. Under secs. 3364, 3366, Stats. 1917, a tender by defendant, in an unlawful detainer action, of the rent due and costs of the action, did not entitle him to a dismissal of the action, but by so doing he admitted the allegations of the complaint. *Hassler v. Sheets,* 419

LATERAL SUPPORT. See ADJOINING LANDOWNERS.

LEASE. See FRAUDULENT CONVEYANCES. LANDLORD AND TENANT.

LEGATEE. See WILLS, 7.

LEGISLATURE. See STATUTES, 1.

LIBEL. See ADMIRALTY, 2.

LIEN. See CARRIERS, 8. HOMESTEAD, 1.

LIFE ESTATE. See WILLS, 6.

LIMITATION.
Of evidence. See CRIMINAL LAW, 4.
Of liability. See CARRIERS, 7.

LIMITATION OF ACTIONS.

Action on account: Break in continuity: Mutual account.

1. Where the first item of plaintiff's claim against her mother's estate was dated August, 1893, and exhibited items for each succeeding year up to March, 1899, when there was a break until January, 1907, with a detailed claim to 1914, recovery was limited to items accruing within six years immediately preceding the mother's death in November, 1914, where the services were not continuous to the mother's death and where the disbursements did not constitute a mutual running account. *Nelson v. Christensen,* 373

In actions of mandamus. See MANDAMUS.

Husband and wife: Contracts before marriage: Payments after marriage.

2. The rule that the statute of limitations does not run between husband and wife on contracts made by them during coverture does not apply to contracts made, and upon which the statute had commenced to run, before coverture. *Enwright v. Griffith,* 284

3. Where a promissory note was given by husband to wife, and the statute of limitations had commenced to run upon it, before their marriage, the statute continues to run after the marriage, and a payment made, during the marriage, upon the note before it was barred does not prevent its becoming barred six years later. Such a payment does not have the effect of making a new contract, but is merely a recognition of the old obligation, operating as an extension of the time of payment. [Whether, if such a payment were made during the marriage and after the note was barred, the statute would still continue to run, is not decided.] *Ibid.*

Same: Contracts after marriage: Wife subrogated to rights of another.

4. Where a mortgagee gave a note and mortgage before maturity to his daughter, the wife of the mortgagor, she was not subrogated to her father's rights, but became her husband's creditor as much as though she had purchased the mortgage, and hence the statute of limitations would not become operative between them. *Flanagan's Estate v. Flanagan's Estate,* 537

Necessity of pleading. See PLEADING, 1.

LOTOWNER. See ADJOINING LANDOWNERS.

MALICIOUS PROSECUTION.

Want of probable cause: Evidence: Admission of defendant.

1. In an action for malicious prosecution, an admission of one of the defendants that up to the time of plaintiff's arrest upon a charge of theft he had known him as an honest man is material for the jury to consider. *McAllister v. Kimberly-Clark Co.* 473

2. Evidence that there was trouble between the parties, that plaintiff had been known as an honest man, and that the stolen goods had been found at a shanty used by plaintiff and others before plaintiff arrived there, is *held* to take to the jury the issue of want of probable cause. *Ibid.*

Same: Punitory damages: Evidence of wealth.

3. In an action against more than one defendant for malicious prosecution, evidence of the wealth of the several defendants is inadmissible, though punitory damages may be assessed and though such evidence would be admissible if there were only one defendant. *McAllister v. Kimberly-Clark Co.* 473

MALPRACTICE. See WITNESSES, 8.

MANDAMUS.

Delay in bringing action: Statute of limitations. See DRAINS, 4.

Whether the statute of limitations applies to actions of *mandamus* is not decided. *It seems* that long and unreasonable delay in commencing the action will be ground for refusing relief, especially where such delay has been prejudicial to respondent's rights; but whether there has been such delay must depend on the facts of the particular case. *State ex rel. Portage Co. D. Dist. v. Newby,* 208

MARITIME CONTRACTS. See ADMIRALTY, 5.

MARRIAGE.

See LIMITATION OF ACTIONS, 2–4. WILLS, 3.

Validity: Marriage with epileptic: Statute.

A marriage with an epileptic prior to the enactment of ch. 218, Laws 1917, was voidable but not void under the laws of this state. *Estate of Jansa,* 220

MASTER AND SERVANT.

Liability for injury to servant: Fellow-servants: Different masters. See ADMIRALTY, 5. WORKMEN'S COMPENSATION.

1. Where a servant was injured through the negligence of a servant of another master, the negligence cannot be said to be that of a fellow-servant, although both masters were engaged in the same enterprise, namely, the unloading of a vessel, there being no identity of control. *Georgia C. Co. v. American M. Co.* 456

Same: Defective apparatus or negligent operation: Inference from accident.

2. Where both an apparatus and its operation are in the control of defendant, and an accident happens which could not ordinarily happen except by reason of defective apparatus or negligent operation by defendant's servants, the fact of the accident might be sufficient of itself to justify a finding of defect in the apparatus or negligence in its operation. *Georgia C. Co. v. American M. Co.* 456

Liability for injury to third persons: Assault by servant. See APPEAL, 30. MUNICIPAL CORPORATIONS. PHYSICIANS AND SURGEONS. STREET RAILWAYS, 11.

3. Where defendant's employees, in the course of their employment, assaulted plaintiff while endeavoring to take possession of a clock upon which plaintiff had failed to make an instalment payment then due, defendant was liable although it did not authorize the procedure employed. *Gerstein v. C. F. Adams Co.* 504

MAXIMS.

Res ipsa loquitur, 386, 388, 389, 460.

Res judicata pro veritate accipitur, 7, 11, 12, 29, 36, 447, 453, 535.

Stare decisis, 7, 12, 29, 36.

MEASURE OF DAMAGES. See CARRIERS, 9. DAMAGES. SALES, 15.
MINORS. See INFANTS.
MISREPRESENTATION. See FRAUD.
MITIGATION OF DAMAGES. See DAMAGES, 1.
MORTGAGES. See APPEAL, 14. EVIDENCE, 14. LIMITATION OF ACTIONS, 4. WITNESSES, 6.
MOTION.
For new trial. See NEW TRIAL.
To review injunctional order. See INJUNCTION.
To strike out testimony. See APPEAL, 25.
MOTION FEES. See COSTS.
MOTOR VEHICLES. See AUTOMOBILES.

MUNICIPAL CORPORATIONS.

Control over streets: Power to grant franchises: Statute.

1. In the absence of a clearly expressed legislative intent it will not be presumed that the legislature intended to withdraw from municipalities the power to grant a franchise for the occupation of city streets conferred upon city councils by sec. 1863, Stats., as amended by ch. 565, Laws 1917. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 183

Torts: Exercise of governmental function: Bathing beach. See APPEAL, 26.

2. A city, in the maintenance of a bath house and bathing beach, acts in its governmental and not in its proprietary capacity. *Nemet v. Kenosha,* 379

Same: Furnishing water to private consumers.

3. While a city, in its governmental capacity as proprietor of a bathing beach, is not liable for the negligence of its agents and officers, nevertheless, being engaged in the business of furnishing water to private consumers, in such respect it acts in a private capacity and is bound to exercise ordinary care, and for failure to do so is liable for injuries proximately caused. *Nemet v. Kenosha,* 379
4. Excavation by a city to extend its private waterworks system across its premises, used by the public for bathing purposes, without giving notice of the presence of the danger, constituted a nuisance, and the city was liable for damages proximately caused thereby. *Ibid.*

Same: Independent contractor of city.

5. If such excavation was so inherently dangerous as to be likely to cause injury to public bathers on its premises, the city was bound to see that precautions were taken to prevent such injury, though the excavation was contracted for by an independent contractor. *Nemet v. Kenosha,* 379
6. Ordinarily, where work is performed for a municipal corporation by an independent contractor the city is not liable for damages resulting from his acts. *Ibid.*

Support and relief of poor. See PAUPERS.

Granting of franchises. See STREET RAILWAYS, 3.

Laying out streets. See EMINENT DOMAIN. INJUNCTION, 1.

Drains: Grading of streets: Surface water.

7. A city is not liable to a property owner for flooding his premises on the ground that by reason of the grading of the streets more water was discharged into a ravine in the block in which his premises were situated than would have come to it in a state of nature. *Andrus v. Ashland,* 362

8. With reference to the liability of a city for the flooding of premises by surface water, rainfalls are divided into three classes: ordinary, extraordinary, and unprecedented; and a city is not liable for damage resulting from extraordinary rainfall. *Ibid.*

Municipal ordinances. See ADJOINING LANDOWNERS. AUTOMOBILES, 2. TRIAL, 13.

MUNICIPAL COURTS. See JUSTICES OF THE PEACE, 3.

MUTUAL BENEFIT SOCIETIES. See INSURANCE.

MUTUAL RUNNING ACCOUNT. See LIMITATION OF ACTIONS, 1.

NEGLIGENCE.

See ADJOINING LANDOWNERS, 4. APPEAL, 18, 23, 26, 31. AUTOMOBILES, 2, 3. CARRIERS, 9. EVIDENCE, 2–7, 9–13. HIGHWAYS, 1, 2. MASTER AND SERVANT, 1, 2. MUNICIPAL CORPORATIONS, 3–8. PHYSICIANS AND SURGEONS, 1. PLEADING, 3. RAILROADS. STREET RAILWAYS, 10–18. TRIAL, 3, 8.

Acts or omissions constituting negligence: Failure to guard against flying stones.

1. A complaint alleging that plaintiff, standing in her yard, was struck by a granite chip which flew from a surfacing machine operated in defendant's monument yard adjacent to her premises, and charging defendant with negligence in failing to properly guard against flying chips, is *held* to state a cause of action. *Angerstein v. Milwaukee M. Co.* 502

Proximate cause: Delay of carrier in repairing road: Loss of goods by fire. See EVIDENCE, 2.

2. Where a carrier knew that forest products banked on a spur track awaiting shipment were exposed to the danger of forest fires, the occurrence of which was and should have been anticipated, and that such danger was in direct proportion to the length of the delay in their transportation, and such products were destroyed by a forest fire more than a month after their tender for shipment, the unreasonable delay in repairing the road was the proximate cause of the loss. *Bell L. Co. v. Bayfield T. R. Co.* 357

Contributory negligence. See APPEAL, 29. AUTOMOBILES, 2, 4, 5. HIGHWAYS, 2, 3. JUDGMENT, 2. NEGLIGENCE, 4, 5. NEW TRIAL, 1. STREET RAILWAYS, 14, 16, 18. TRIAL, 11.

Operation of machinery: Knowledge of danger.

3. In an action by a parent to recover for injuries to her minor son whose fingers were cut off by the knives of a machine

operated by him in defendant's factory to cut the corners from card-board squares, the evidence—showing, among other things, that he was familiar with the machine and fully aware of the dangers incident to its operation—is *held* to have warranted the circuit court in holding, contrary to the jury's finding in the civil court, that in using his fingers to clean out the slots under the knives, without blocking the treadle of the machine, the boy was guilty of contributory negligence which precluded a recovery. *Scheiderer v. A. George Schulz Co.* 6

Same: Degree of proof: Question for jury.

4. A person cannot be held to have been guilty of contributory negligence as a matter of law unless the proof is so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion. *Bassett v. Milwaukee N. R. Co.* 152

Actions for damages: Burden of proof.

5. It is the duty of plaintiff in a negligence case to affirmatively prove negligence. *Klein v. Beeten,* 385

Same: Evidence: Res ipsa loquitur.

6. Where an automobile running fifteen miles an hour on a smooth road suddenly swerved and ran into a ditch, and after the accident a blow-out in the front tire was found, the doctrine of *res ipsa loquitur* did not apply. *Klein v. Beeten,* 585

Same: Presumption from accident: Defective apparatus or negligent operation. See MASTER AND SERVANT.

7. When both an apparatus and its operation are within defendant's control, and the accident is one which ordinarily could not happen except by reason either of a defect or negligent operation, a presumption of one or the other arises sufficient, from the happening of the accident, to justify a verdict against defendant. *Klein v. Beeten,* 385

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE. See NEW TRIAL.

NEW TRIAL.

Grounds: Failure of jurors to understand question in special verdict.

1. Upon a motion for a new trial, a verdict finding plaintiff guilty of contributory negligence cannot be impeached by affidavits of jurors to the effect that they misunderstood a question in the special verdict and that they never intended to convict plaintiff of such negligence. *Holub v. Cootware,* 176

Same: Inconsistent findings. See TRIAL, 12.

Same: Newly discovered evidence: Diligence. See APPEAL, 10.

2. Affidavits in support of a motion for a new trial in an action to recover insurance on the life of one who had disappeared

several years before, which show that a person of the same name, coming from the same place, was then living in another country, and that the insured had been seen within two years of the commencement of the action, require the granting of a new trial on the ground of newly discovered evidence. *Sweet v. Modern Woodmen,* 462

3. Where the wife of the insured had not heard from him for more than eight years and did not know his whereabouts, she cannot defeat the insurer's right to a new trial for newly discovered evidence that the insured was alive, on the ground of the insurer's lack of diligence in locating the insured before the trial. *Ibid.*

Same: Evidence not materially altering facts.

4. A motion for a new trial on the ground of newly discovered evidence as to plaintiff's state of health before his injury, which did not materially alter the facts previously presented, was properly denied. *Bell v. Milwaukee E. R. & L. Co.* 408

Reversal without new trial. See COURTS, 2.

NONRESIDENT DEFENDANTS. See PROCESS, 1, 2.

NOTICE.
Of appeal. See APPEAL, 1, 4.
Of fire loss. See INSURANCE, 6, 8.
Of intention to excavate land. See ADJOINING LANDOWNERS, 2.
Of motion. See INJUNCTION, 1.
Of possession of land. See LANDLORD AND TENANT, 1.

NOVATION.

Nature and requisites: Effect.

To effect a substitution of debtors, the consent of three, the creditor, the old debtor, and the new debtor, is required. *Elkey v. Seymour,* 223

NUISANCE. See MUNICIPAL CORPORATIONS, 4.

OBLIGATION OF CONTRACTS. See CONSTITUTIONAL LAW, 2.

OFFENSES. See INDICTMENT AND INFORMATION.

OFFICERS.
Of United States. See UNITED STATES.
Of counties. See TAXATION, 6.
Of corporations. See CORPORATIONS, 15.

OPENING DEFAULT. See JUDGMENT, 1.

OPINION EVIDENCE. See EVIDENCE, 16.

OPTION. See CORPORATIONS, 5. VENDOR AND PURCHASER.

PARENT AND CHILD. See NEGLIGENCE, 3.

PAROL EVIDENCE. See EVIDENCE.

PARTIES. See ACTION. PROCESS.

PASSENGER. See STREET RAILWAYS, 10.

PAUPERS.

Right to relief: Contract with city to furnish relief: Authority of city officials: Novation to relieve city from liability.

1. A contract by which the lawful authorities of a city employed plaintiff to relieve the immediate necessities of a person as being one with whose relief the city was chargeable, is binding upon the city. *Elkey v. Seymour,* 223
2. Plaintiff in such case, though bound to know or ascertain at her peril the scope of the power of the city officials making the contract, was not bound to ascertain whether the person to be relieved was lawfully entitled to such relief from the city. That duty rested upon said officials. *Ibid.*
3. An aged, infirm woman, having a lawful settlement in a city, who was dangerously ill and had no immediate family who could obtain food and shelter for her and was without any present ability to pay for the immediately needed care, nursing, and shelter, was entitled to relief from the city, within the intent of sec. 1499, Stats. *Ibid.*
4. Under the statutes a material distinction exists between relief and support of poor persons. *Ibid.*
5. The mere present ownership of property which may subsequently become available to recompense a city for relief or support furnished to the owner, does not create a jurisdictional lack of authority in the proper officials to furnish or contract for the furnishing of such aid. *Ibid.*
6. Although plaintiff, who had been employed by the proper officials of a city to furnish relief to a poor person, refused a subsequent offer of such officials to pay her for her services, saying that she would not look to the city but to the attorney of the person relieved, her right to recover from the city was not in any way affected by such refusal, no tender of the amount due having been actually made or kept good. *Ibid.*
7. The attorney of the person to whom relief was given, not being shown to have been the attorney or agent of the plaintiff, a payment of money to such attorney by a debtor of the person relieved was not in any way a discharge of the obligation of the city to the plaintiff upon the contract under which the relief was furnished. *Ibid.*
8. If there is property or money in which the person who received relief has or had an interest which may be properly chargeable for such relief, the city has ample remedy under sec. 1505*a*, Stats. *Ibid.*

PAYMENT. See BILLS AND NOTES, 5.

PEDESTRIAN. See STREET RAILWAYS, 17.

PENALTIES. See DRAINS, 1, 3.

PERFECTION OF APPEAL. See APPEAL, 5–7.

PERMANENT INJURY. See DAMAGES, 3.

PERPETUITIES. See WILLS, 6.

PERSONAL INJURIES. See ADMIRALTY, 2, 3, 5. APPEAL, 23, 30. AUTOMOBILES, 2, 5. DAMAGES, 2, 4–7. DEATH, 2. EVIDENCE, 2. HIGHWAYS, 1–3. MASTER AND SERVANT, 1–3. NEGLIGENCE. NEW TRIAL, 1, 4. PHYSICIANS AND SURGEONS, 1, 2. PLEADING, 3. STREET RAILWAYS, 10–18.

PERSONAL PROPERTY. See AUTOMOBILES, 1. CORPORATIONS. TAXATION. TELEGRAPHS, 1. TRADING STAMPS. WILLS, 7, 9. WITNESSES, 3.

PHYSICIANS AND SURGEONS.

Actions for negligence: Negligence of attendant in executing physician's orders: Master and servant: Proximate cause.

1. In an action by a husband for loss of his wife's consortium, occasioned by the defendant physician's alleged negligence, the evidence is *held* insufficient to show that defendant was negligent in telling a woman employed by plaintiff to put a hot iron in the bed at the feet of plaintiff's wife, he having a right to rely upon such attendant's knowledge and that she would not so place the iron as to burn the patient. *Malkowski v. Graham,* 398
2. Such direction of the physician did not create the relation of master and servant between the physician and such attendant. *Ibid.*
3. Nor was such direction of the physician the proximate cause of an injury arising from the burning of the patient's feet, as the physician could not reasonably have anticipated that an ordinarily prudent person would so place the iron as to burn the patient. *Ibid.*

Privileged communications. See EVIDENCE, 10, 17. INSURANCE, 3. WITNESSES, 9.

PLEADING.

Complaint. See CONTRACTS, 5. NEGLIGENCE, 1. PROCESS, 2.

Informations. See INDICTMENT AND INFORMATION.

Answer or demurrer: Statute of limitations: Waiver. See CONTRACTS, 10. INSURANCE, 7.

1. The objection that an action is barred by the statute of limitations is waived if not taken by demurrer or answer. *State ex rel. Portage Co. D. Dist. v. Newby,* 208

Counterclaim. See STIPULATIONS.

Joinder of defendants. See CORPORATIONS, 8.

Amendment of pleadings: To conform to evidence.

2. In an action for $8,000 for services against the estate of a deceased person under an alleged contract, where both parties were somewhat in the dark as to what they could prove, the court did not abuse its discretion in allowing claimant to amend to show that the amount due to her was $9,605.52, to conform to the evidence. *McNaughton v. McClure,* 288

Same: Application made during trial: Facts known to party making application.

3. In an action against an automobile owner and his insurer, the court properly denied the application of the defendant indemnity company to amend its answer to show that the car in question was not covered by the indemnity bond, such application not being made until the trial was almost completed and no claim being made that the defendant company did not know such fact at the commencement of the trial. *Ehlers v. Automobile Liability Co.* 494

POLICE POWER. See CONSTITUTIONAL LAW, 1. TELEGRAPHS.

POLICY OF INSURANCE. See INSURANCE.

POOR. See PAUPERS.

PRACTICAL CONSTRUCTION. See STATUTES, 4.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 4.

PRESUMPTIONS. See EVIDENCE.

PRINCIPAL AND AGENT.

Authority of agent. See BANKS, 6. BILLS AND NOTES, 1. CORPORATIONS, 15. EVIDENCE, 9. HUSBAND AND WIFE. VENDOR AND PURCHASER.

Notice of agent imputed to principal. See BROKERS, 1.

Admissions of agent. See EVIDENCE, 9–11.

Gains made by agent: Ownership: Accounting. See BROKERS, 2.

1. All profits made and advantage gained by an agent in the execution of the agency belong to the principal, whether the result of the performance or of the violation of a duty of the agent, if the fruit of the agency. *Pederson v. Johnson,* 320

Same: Benefit of agent.

2. An agent may not take advantage of the confidential relationship existing between himself and his principal for his own benefit, even though the principal is not injured thereby. *Pederson v. Johnson,* 320

PRINCIPAL AND SURETY. See HUSBAND AND WIFE, 1, 2.

PRIVATE CARRIER. See COURTS, 1.

PRIVILEGED COMMUNICATIONS. See WITNESSES, 8.

PROCEEDINGS IN REM. See ADMIRALTY, 4.

PROCESS.

Service by publication: Trusts and appointment of trustees.

1. Sec. 2639, Stats., authorizes service of the summons by publication upon a person who claims the right to appoint a cotrustee and upon the person claiming to be such cotrustee, they being residents of another state, a cause of action against them being stated, and the relief demanded consisting in excluding them from an interest which they claim in the personal property, located in this state, constituting the trust estate. *Laughlin v. Griswold,* 50

2. Service by publication upon the *cestui que trust* is also authorized, she being a nonresident and having an interest in the property. The purpose of the action by the trustee being to fix the status of the property and the rights and duties of the parties, and the *cestui que trust* being a necessary party, the complaint states a cause of action against her within the meaning of said sec. 2639, Stats., even though it does not seek to deprive her of anything. *Ibid.*

PRODUCTION OF DOCUMENTS. See WITNESSES, 2.

PROFITS, as an element of damages. See LANDLORD AND TENANT, 4.

PROOFS OF LOSS. See INSURANCE, 6.

PROPRIETARY CAPACITY. See APPEAL, 26. MUNICIPAL CORPORATIONS, 2.

PROXIMATE CAUSE. See NEGLIGENCE, 2.

PUBLIC POLICY. See CORPORATIONS, 2.

PUBLIC SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC UTILITIES.

See CARRIERS. RAILROADS. STREET RAILWAYS.

Right of running cars on particular street: Franchise: Action: Proceeding to test reasonableness of rule of company.

1. One who, in the enforcement of a rule excluding urban traffic from interurban cars, was prevented, in a city, from entering and becoming a passenger in an interurban car, cannot, in an action for damages based on such exclusion, test the question whether the company had a proper franchise for the running of its interurban cars on the street in question. *Campbell v. Milwaukee E. R. & L. Co.* 171

2. Any question as to the reasonableness of such a rule should be determined first in a proceeding before the railroad commission, before resort is had to the courts. *Ibid.*

Rate making: Determination by railroad commission: Elements: Capital upon which rate is based.

3. The railroad commission, in fixing rates charged by a street railway company, is not bound, in determining the capital of the company, to allow the amounts paid by it in purchasing separate systems of which its system was composed. *Milwaukee E. R. & L. Co. v. Railroad Comm.* 421

Same: Adjudications in action in federal court.

4. When the state asserted and put into operation the power to fix rates and fares by means of a railroad commission, the commission was not bound in its estimate of value by the conclusion reached in an action previously brought in the federal court against a city in which the street railway company whose rates were involved was operated. *Milwaukee E. R. & L. Co. v. Railroad Comm.* 421

Review of order of railroad commission: "Emergency order:" General rate order: Degree of proof.

5. In an action to set aside an order of the railroad commission fixing rates for street-car fares on the lines of the defendant street railway company in La Crosse, it is *held* that no "emergency" existed for making the order under sec. 1797—28, Stats., but that the order, though containing the word "emergency," was valid as a general rate order under sec. 1797—12. *Smith v. Railroad Comm.* 547

6. To justify the trial court in disturbing an order of the commission made in due course, it must be established by clear and satisfactory evidence that the order was unlawful or unreasonable. *Ibid.*

Same: Effect of order of railroad commission rescinding prior order.

7. Where the railroad commission, after making an order fixing street railway fares, thereafter rescinded the same in a new proceeding on the ground that the rate was then unreasonable, the court cannot, under secs. 1797—14 to 1797—16, in a proceeding in which the rate first fixed was attacked, treat the rescission by the railroad commission as having voided the rate *ab initio*. If that were permitted there would be no certainty as to when a legal rate was in force. *Milwaukee E. R. & L. Co. v. Railroad Comm.* 421

Same: Findings by court: Burden of proof.

8. Under sec. 1797—16, Stats., providing that in actions to set aside an order of the railroad commission fixing rates the burden of proof shall be on the plaintiff to show that the order is unlawful or unreasonable, a general finding by the court that street railway fares fixed by the commission were unreasonable is sufficient; and sec. 2683 does not require findings of the fundamental facts upon which the ultimate conclusion of unreasonableness is based. *Milwaukee E. R. & L. Co. v. Railroad Comm.* 421

PUNITORY DAMAGES. See MALICIOUS PROSECUTION.

QUANTUM MERUIT. See WILLS, 2.

RAILROAD COMMISSION. See EVIDENCE, 1. PUBLIC UTILITIES. STREET RAILWAYS.

RAILROADS.

See APPEAL, 18, 29. CARRIERS. COURTS, 1. EVIDENCE, 9. NEGLIGENCE, 2. WORKMEN'S COMPENSATION, 9.

Injuries at crossings: Negligence: Gross negligence. See APPEAL, 29. AUTOMOBILES, 5.

In an action for the killing of the driver of a popcorn wagon at a railroad crossing, evidence as to the engineer's acts or failure to act after seeing that deceased was oblivious to danger is *held* not sufficient to take to the jury the issue of gross negligence. *Todoroff v. Chicago & N. W. R. Co.* 554

RATE. See PUBLIC UTILITIES, 3. STREET RAILWAYS, 4-7.

RATIFICATION. See VENDOR AND PURCHASER.

REAL-ESTATE BROKERS. See BROKERS.

REAL PROPERTY. See ADJOINING LANDOWNERS, 1–5. BOUNDARIES. DRAINS, 1, 3. EMINENT DOMAIN. HOMESTEAD, 1–4. INJUNCTION, 1. LANDLORD AND TENANT, 1–5. MUNICIPAL CORPORATIONS, 7, 8. TAXATION. WILLS, 3, 4.

RECORD. See CRIMINAL LAW, 7. GARNISHMENT.

REJECTION OF CONTRACT. See CONTRACTS, 2.

RELIEF OF POOR. See PAUPERS.

REMEDIES. See ADMIRALTY, 4.

RES ADJUDICATA. See JUDGMENT, 2.

RES GESTÆ. See EVIDENCE, 10.

RES IPSA LOQUITUR. See NEGLIGENCE, 6.

RESTRAINING ORDER. See INJUNCTION.

RESTRAINT ON ALIENATION. See WILLS, 6.

RETURN, on appeal to circuit court. See APPEAL, 8.

REVERSIBLE ERROR. See APPEAL, 21.

REVIVAL OF ACTION. See EXECUTORS, 5.

REVOCATION OF OFFER. See CONTRACTS, 2.

ROADS AND STREETS. See STREETS.

RUNNING ACCOUNT. See LIMITATION OF ACTIONS.

SALES.

See FRAUD, 1–3. FRAUDULENT CONVEYANCES. GUARANTY, 1. STIPULATIONS.

Construction of contract: Sale by correspondence: Sale of year's output.

1. A sales contract entered into by correspondence will be construed from the whole of the correspondence. *Allen v. Wolf River L. Co.* 253
2. Where the seller wrote to the buyer stating that he was going to peel about 1,000 cords of bark during the year and offering to sell such amount to the buyer, a contract entered into, after considerable correspondence as to price, by the buyer's acceptance of the seller's offer of "our peel this year" at a stipulated price, was a contract for 1,000 cords. *Ibid.*

Performance of contract: Place of delivery.

3. Where, under a contract for goods to be delivered at any point having a certain rate, the buyer, pursuant to a request for shipping directions, named a point having such rate, such point was the place of delivery. *Allen v. Wolf River L. Co.* 253
4. Where the seller's offer of goods at a stipulated price at any point having a certain rate is accepted, the seller does not complete the contract and is not entitled to the price until the goods are delivered at a point having such rate, under sub. 5, sec. 1684*t*—19, Stats. *Ibid.*

5. Unless provision to the contrary is made, title passes with delivery. *Ibid.*

Same: Time of delivery: No time stated.

6. Where the time of delivery is not fixed in a sale of goods, delivery must be made within a reasonable time. *Lukens I. & S. Co. v. Hartmann-Greiling Co.* 350

Acceptance of goods: Acceptance after test: Waiver of objection to retention.

7. A provision in a written warranty that a tractor sold by defendant to plaintiff might be tested for one day and that retention thereafter should constitute an acceptance, is *held* waived by the vendor in view of the conduct of the parties. *Svoboda v. Barta,* 338

8. Under sec. 1684*t*—48, Stats., as to acceptance of goods by retention for longer than a reasonable time, retention of the tractor for nearly a year after delivery is not, as a matter of law, a retention amounting to acceptance, in view of evidence that opportunities for testing were limited and that the buyer was being urged by the seller to give the tractor a further trial upon the assurance that it would be made to work. *Ibid.*

Warranties: Express warranties: Standard goods: Implied warranty upon purchase from catalogue.

9. In a written contract plaintiff expressly warranted all Blaugas "plants or systems" sold by it to defendants at a stated price to be in good working order and free from defects in material and workmanship. Certain connections and fixtures not included in the plant or system itself were necessary to constitute a complete cooking or lighting plant, and the contract provided separately that, while the defendants might purchase such appliances from whomsoever they pleased, they must first be approved by plaintiff; also that they might be ordered from plaintiff at a certain discount from list prices. *Held,* that the express warranty did not cover such fixtures. *Northwestern Blaugas Co. v. Guild,* 98

10. As to fixtures ordered by defendants from plaintiff's catalogue which were standard fixtures and sold by a trade name, no implied warranty as to quality or fitness for the particular purpose arose under sec. 1684*t*—15, Stats. *Ibid.*

Remedy of buyer: Failure to deliver: Damages.

11. One who breaches a contract to deliver materials is chargeable with such damages as might fairly and reasonably be considered as either arising naturally—that is, according to the usual course of things—from such breach, or such as may reasonably be supposed to have been in contemplation by both parties, at the time they made the contract, as the result of a breach thereof. *Lukens I. & S. Co. v. Hartmann-Greiling Co.* 350

12. Where the seller had failed to deliver materials within the time agreed, an agreement to waive damages if they should be shipped December 1st was not binding on the purchaser where they were not shipped until December 9th. *Ibid.*

13. The mere acceptance by the purchaser of property after damages have accrued in consequence of nondelivery according to contract does not waive or relinquish a right of action for damages which had accrued at the time of acceptance. *Ibid.*

14. Where steel was ordered to be used in completing a marine boiler to be installed in a dredge then being constructed by the purchaser for the government, the purchaser being liable to certain penalties if the boiler was not completed on a certain date, an agreement by the seller to deliver the steel within three weeks was of the essence of the contract, the seller having knowledge of the penalties. *Ibid.*

15. Where the buyer of steel castings indicated to the seller special circumstances concerning the buyer's contract to furnish castings to another party and the buyer's obligation to deliver thereunder, the seller, which broke the contract by delivering too high a percentage of defective castings, was liable to the buyer for the admitted amount of damages incurred by it through payment to the party to which it had agreed to furnish the castings itself. *Hubbard S. F. Co. v. Federal B. & S. Co.* 277

16. Where the time of delivery was not specified, the buyer's measure of damages under sub. 3, sec. 1684*t*—67, Stats., upon the seller's failure to deliver, was the difference between the contract price and the market price at the place of delivery at the time of the seller's refusal to deliver. *Allen v. Wolf River L. Co.* 253

Same: Termination of contract upon failure to deliver.

17. Where a manufacturer and seller of steel castings was in default for nondelivery of a large quantity, and the buyer was warranted in believing that the seller was unable to make timely delivery of such castings as the contract called for, the buyer was justified in standing on a breach by the seller in furnishing castings which were seventy per cent. unfit, in declaring the contract ended, and in demanding return of its patterns to enable it to contract with others. *Hubbard S. F. Co. v. Federal B. & S. Co.* 277

SALES OF CORPORATE STOCK. See CORPORATIONS, 5–8.

SALES OF CROPS. See CROPS, 1.

SALES OF LAND. See BROKERS. VENDOR AND PURCHASER.

SALES ON FORECLOSURE. See CORPORATIONS, 1.

SALESMAN. See WORKMEN'S COMPENSATION, 11.

SATISFACTION OF MORTGAGES. See EVIDENCE, 14.

SCHOOLS AND SCHOOL DISTRICTS.

Right of child to attend school: Power of school board to exclude him: Review by courts.

1. The right of a child of school age to attend the public schools of this state cannot be insisted upon when his presence therein is harmful to the best interests of the school. *State ex rel. Beattie v. Board of Education,* 231

2. A board of education which, under the law, had "in all respects the supervision and management of the common schools" of a city, with power to make "rules and regulations for their organization, government or instruction, . . . and the transfer of pupils from one department to another, and generally for their good order and advancement," had power, acting in good faith, to determine that, by reason of his physical condition and ailments, the presence of a boy in school was harmful to the school and to other pupils, and that therefore he should be excluded. *Ibid.*

3. Such a determination by a school board should not be interfered with by the courts unless it is shown to have been illegal or unreasonable. *Ibid.*

4. Although, in the first instance, the exclusion of the boy from the schools was not the result of action taken at a formal meeting of the board, yet, when the board at a subsequent regular meeting conferred upon the question whether he should be reinstated, and a motion that he be reinstated received no second, this amounted to a determination by the board, acting as such, that he be excluded. *Ibid.*

SEPARATE ESTATE. See HUSBAND AND WIFE, 2.

SERVICE BY PUBLICATION. See PROCESS, 1.

SERVICES RENDERED. See BROKERS, 4. EXECUTORS, 1. FRAUDS, STATUTE OF, 2. WILLS, 2.

SPECIAL VERDICT. See APPEAL, 11, 27, 28, 32. TRIAL.

SPECIFIC PERFORMANCE. See CORPORATIONS, 7.

SPENDTHRIFTS. See INSANE PERSONS, 2.

STARE DECISIS. See JUDGMENT, 2.

STATES. See TAXATION, 1. UNITED STATES.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW, 4. CROPS. JUSTICES OF THE PEACE, 2. TAXATION.

Presumption of purpose from enactment.

1. The enactment of a statute without a purpose should not be attributed to the legislature. *State ex rel. Mason v. Larsen,* 298

Amendment to statute: Construction.

2. An amendment to a statute must be construed with reference to the other provisions of the statute amended. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 183

Construction of statutes. See ADMIRALTY, 1–3. APPEAL, 3, 5, 8, 26. BANKS, 1–5. BILLS AND NOTES, 3, 4. CARRIERS, 3, 5, 7. CONSTITUTIONAL LAW, 3, 4. CONTRIBUTION, 1. CRIMINAL LAW, 1, 6. CROPS, 1, 2. DEATH, 2. DRAINS, 1, 2. EMINENT DOMAIN. EXECUTORS, 8. FORGERY, 1. FRAUDS, STATUTE OF, 1.

FRAUDULENT CONVEYANCES, 1. HUSBAND AND WIFE, 2. INDICTMENT AND INFORMATION. INSURANCE, 6–8. JUSTICES OF THE PEACE, 1, 4. LANDLORD AND TENANT, 5. MUNICIPAL CORPORATIONS, 1. PAUPERS, 3, 8. PROCESS, 1, 2. PUBLIC UTILITIES, 8. SALES, 4, 8, 10, 16. STREET RAILWAYS, 1-3. TAXATION, 1, 5, 7. WITNESSES, 8, 9. WORKMEN'S COMPENSATION, 9–11.

3. A statute will be construed as a whole, and effect given to every part thereof. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 183

Same: Practical construction.

4. A practical construction, however long adhered to, cannot override the plain terms of a statute. *Waldum v. Lake Superior T. & T. R. Co.* 137

STAY OF PROCEEDINGS. See INJUNCTION.

STEVEDORES. See ADMIRALTY, 2–5.

STIPULATIONS.

Oral stipulation of counsel as to correctness of amounts stated in counterclaim: Effect.

In an action by a seller for the purchase price of goods, the buyer counterclaiming for various damages on account of defective goods, an oral stipulation between counsel that the amounts of the items of the counterclaim specified in the buyer's exhibit were correct, but which admitted nothing as to the validity of the charges, rendered proper an allowance against the seller of all the items of the exhibit, if the seller's liability on the counterclaim was shown. *Hubbard S. F. Co. v. Federal B. & S. Co.* 277

STOCK. See CORPORATIONS.

STOCKHOLDERS. See CORPORATIONS. EXECUTORS, 8.

STREET RAILWAYS.

Control and regulation: Power of consolidation: Urban and interurban railways. See MUNICIPAL CORPORATIONS, 1.

1. Sub. 3, sec. 1775, and sec. 1862*a*, Stats., both having their origin in ch. 234, Laws 1891, though in terms granting power to consolidate "street railways," authorize consolidation of the urban lines of one company and the urban and interurban lines of another company, both organized to own and operate both kinds of business, the term "street railway" having for years before the enactment been used by the legislature to include both kinds of railways. *Milwaukee v. Railroad Comm.* 559

Same: Jurisdiction of railroad commission: Determination of convenience and necessity. See PUBLIC UTILITIES.

2. Sec. 1863, Stats., giving the railroad commission jurisdiction to determine the necessity of extending the line of any street railway corporation operating "within any municipality," applies to street railroads, and not exclusively to interurban or

suburban railroads, in view of the amendment introduced by ch. 565, Laws 1917. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 183

3. Sec. 1863, Stats., as amended by ch. 565, Laws 1917, must be construed to require a street railway corporation operating within a municipality to construct its railway upon such streets as the municipality may have designated by franchise or otherwise, if public convenience and necessity require such extension, giving to the railroad commission power to determine whether public convenience and necessity require the proposed extension and making the procurement of the certificate of convenience and necessity from the railroad commission a condition precedent to the right of the municipality to compel the construction of the extension. *Ibid.*

Same: Regulation of rate: Reasonable return.

4. A reasonable rate of street railway fares is a rate which yields a fair return on the value of property necessarily employed over and above expenses and depreciation; and a rate of seven and a half per cent. is a fair return. *Milwaukee E. R. & L. Co. v. Railroad Comm.* 421

Same: Power to fix rates: Judicial review.

5. While an order of the railroad commission fixing street railway rates may be attacked in the courts as unreasonable, the power to fix future rates is not a judicial one. *Milwaukee E. R. & L. Co. v. Railroad Comm.* 421

6. In an action to set aside an order of the railroad commission requiring a street railway company to sell tickets in packages of thirteen for fifty cents instead of six for twenty-five cents, the evidence is *held* to show that from the time the order was entered in August, 1912, the rate fixed was not reasonable. *Ibid.*

Operation: Official rules or regulations: Enforcement.

7. A common carrier of passengers may adopt reasonable rules and regulations for the management of its business and use the necessary amount of force to secure their observance. *Campbell v. Milwaukee E. R. & L. Co.* 171

8. A company which operated both urban and interurban cars upon the streets of a city had the right to make and enforce a rule by which the interurban cars were reserved for interurban traffic only and city traffic excluded therefrom, such a separation of urban and interurban service having been approved as proper by the railroad commission. *Ibid.*

Same: Purpose of regulation: Knowledge of passenger: Effect.

9. A rule of a street railway company excluding passengers from the motorman's cab was not admissible in evidence in an action brought by the passenger for personal injury, unless its purpose was to promote the safety of passengers and plaintiff had knowledge of its existence. *Bassett v. Milwaukee N. R. Co.* 152

Injuries to passengers: Person who has left car: Attack by motorman.

10. A passenger on a surface street railway ceases to be such as soon as he safely steps from the car into the public street and has had a reasonable opportunity to leave the place at which he alights, provided he is set down at a place which is reasonably safe and proper for that purpose. *Will v. Milwaukee E. R. & L. Co.* 38

11. Plaintiff's intestate, while riding on a street car, had been rebuked by the motorman for smoking in the car and for spitting on the floor. After he had alighted and as the car was starting he applied an insulting epithet to the motorman, who thereupon checked the car and, upon repetition of the epithet, descended to the street and engaged in an altercation with him which continued until both of them were near the sidewalk. The motorman then struck the decedent with his fist, causing him to fall and sustain an injury which resulted in his death. *Held,* that the decedent had ceased to be a passenger before the assault which caused the injury, that such assault was independent and separate from any prior altercation in the car, and that in making it the motorman was not acting within the scope of his employment so as to render the street railway company liable. *Ibid.*

Same: Passenger falling from car: Sudden jar or sway of car.

12. Evidence showing or tending to show that an adult passenger on a street car, in full possession of his faculties and familiar with the streets over which the car was passing, got up from his seat when the car—which was then running at a high but not unusual rate of speed and was swaying from side to side—was less than a block from his destination, and, the conductor having opened the door for him to pass, went out upon the rear platform, from which almost immediately he fell and was injured, is *held* not to sustain a finding by the jury that the conductor failed to exercise ordinary care in so opening the door,—there having been nothing in the passenger's appearance to indicate that special care should be exercised in his behalf. *Griebenow v. Chicago & M. E. R. Co.* 12

13. No sudden jar or sway of the car after the door was opened and the passenger stepped out could be taken into account in determining the conductor's negligence, in the absence of any showing that the roadbed just beyond was, to his knowledge, out of repair or uneven. *Ibid.*

Same: Passenger riding in motorman's cab.

14. A passenger upon an interurban car who, because it was crowded beyond its seating capacity and because of the boisterous conduct of its occupants, rode in the motorman's cab, which was inclosed so that he was as secure from being thrown off as he would have been had he occupied a seat in the passenger compartment, cannot be held, as a matter of law, to have been guilty, in so riding, of contributory negligence which would preclude a recovery from the railway company for inju-

ries sustained in a head-end collision caused by the negligence of the motorman. *Miller v. C., St. P., M. & O. R. Co.* 135 Wis. 247, distinguished. *Bassett v. Milwaukee N. R. Co.* 152

Same: Passenger injured through explosion. See EVIDENCE, 20.

Accidents at crossings: Collision with automobile: Excessive speed of car. See APPEAL, 31.

15. In an action for injuries sustained in a collision between defendant's street car and plaintiff's automobile, struck from the rear, the jury's finding that the street car was moving at the rate of eighteen miles an hour is a sufficient basis upon which to rest their findings of actionable negligence, without reference to the breach of a city ordinance limiting the speed of street cars to twelve miles an hour. *Alshuler v. Milwaukee E. R. & L. Co.* 477

16. The evidence in this case is *held* sufficient to sustain findings that defendant was negligent in operating its car at a speed of eighteen miles an hour, in failing to give warning of its approach, and in failing to keep a proper lookout; and also to show that plaintiff and her driver were not guilty of contributory negligence. *Ibid.*

Accidents to pedestrians: Duty to avoid accident: Sudden emergency. See EVIDENCE, 5.

17. A street-car motorman, observing a pedestrian in danger, must use all reasonable care to avoid striking him; but if a sudden emergency arises without his negligence and there are different ways to avoid collision, he is not negligent because he fails to select the best course. *Williams v. Duluth St. R. Co.* 261

18. In an action against a street railway company for negligently causing the death of a pedestrian while crossing its tracks, the evidence is *held* to sustain findings that the motorman was not guilty of negligence in the operation of the car which struck decedent and that decedent was negligent. *Ibid.*

19. Omission of the company to promulgate rules for the management of its cars in snowy weather had no bearing on the legal responsibility for its alleged negligence through its motorman in killing a pedestrian on its tracks in a snowstorm. *Ibid.*

STREETS. See AUTOMOBILES, 2, 3, 5. DEATH, 2. EMINENT DOMAIN. EVIDENCE, 5. HIGHWAYS. INJUNCTION, 1. MUNICIPAL CORPORATIONS, 1, 7, 8. NEGLIGENCE, 6. PUBLIC UTILITIES, 1, 3, 4. STREET RAILWAYS, 7, 8.

SUBROGATION. See INSURANCE, 5. LIMITATION OF ACTIONS.

SUBSTITUTION OF DEBTOR. See NOVATION. PAUPERS, 6–8.

SUNDAY. See LANDLORD AND TENANT.

SUPPLEMENTAL RETURN, on appeal to circuit court. See APPEAL, 6.

SUPPORT OF POOR. See PAUPERS.

SUPREME COURT. See APPEAL AND ERROR.

SURETY. See HUSBAND AND WIFE.

SURFACE WATER. See MUNICIPAL CORPORATIONS, 8.

TARIFFS. See EVIDENCE, 1.

TAXATION.

Collection of taxes. See DRAINS.

Tax sales: Exclusive purchase by county: Constitutionality. See CONSTITUTIONAL LAW, 3, 4.

1. Sec. 1191, Stats. 1917, providing that the county shall be the exclusive purchaser at a tax sale of property upon which it holds any certificate of sale, is valid; the state and county, in such case, having an interest which may be protected by withholding the lands from competitive bidding. *State ex rel. Mason v. Larsen,* 298

Inheritance and transfer taxes: State and federal taxes: Basis of tax: Deductions.

2. Both federal and state governments may impose a tax upon the transfer of property at death. Such taxes may be levied by both governments in the exercise of the power of reasonable regulation and taxation of transfers of property. *Estate of Week,* 316
3. The basis of the inheritance tax is not inherently and necessarily the value of the property. The legislature may fix any arbitrary basis for its computation. It has made such basis the clear market value of the property as of the instant of death. *Ibid.*
4. The statute neither expressly nor impliedly provides for any deductions from such value as a basis for the computation of the inheritance tax. *Ibid.*
5. The so-called federal estate tax provided for by sec. 201 of the act of Congress of September 8, 1916 (39 U. S. Stats. at Large, 756, ch. 463), should not be deducted from the value of the estate in computing the amount of the state inheritance tax. *Ibid.*
6. The state inheritance tax law having for twenty years been construed by county courts and administrative officers, with the acquiescence of the legislature, to allow the deduction of expenses of administration in determining the amount of the tax, has received a practical construction which only the legislature should change, notwithstanding such deduction is not expressly authorized by the act itself. *Ibid.*

Same: Gifts prior to death of donor: Taxation: Determination whether gift is material part of donor's estate.

7. Sec. 1087—1, Stats., as amended by ch. 643, Laws 1913, which provides that gifts of a material part of a donor's estate, made within six years prior to his death, shall be construed to have been made in contemplation of death so far as transfer taxes are concerned, constitutes a legislative definition of what is a transfer in contemplation of death, and not a mere rule of law making the fact of such gifts *prima facie* evidence that they were made in contemplation of death. *Estate of Ebeling,* 432
8. Whether gifts so made are held to be gifts in contemplation of death or gifts *inter vivos,* they are within the taxing power of the legislature. *Ibid.*

9. The determination as to whether a gift constitutes a material part of the donor's estate is a judicial question, to be decided in each case as it arises. *Ibid.*

10. Occasional gifts of $500 or $1,000 made by a donor possessing an estate of more than $332,000 do not constitute a material part of his estate and are not taxable; but gifts of $10,000 to each of his three children in June, $5,000 to each in August, and $10,000 to each in October, amounting to more than $75,000, constitute a material part of his estate and are taxable. *Ibid.*

TAXATION OF COSTS. See APPEAL, 3, 4. COSTS.

TAX SALES. See TAXATION, 1.

TELEGRAPHS AND TELEPHONES.

Regulation: Control during war: Fixing of intrastate rates. See UNITED STATES.

A Congressional resolution authorizing the President "to supervise or to take possession and assume control of" and "operate" any telegraph or telephone system for the duration of the war, and providing that the resolution should not be construed to affect the police regulations of the state, is *held* to authorize the fixing of intrastate rates, the words "possession," "control," and "operation" importing absolute power over the subject without interference, and "police regulations" referring merely to regulations to insure the lives, health, and welfare of the public and the employees. *State ex rel. Blaine v. Wisconsin Tel. Co.* 198

TENANCY FROM YEAR TO YEAR. See FRAUDS, STATUTE OF, 1.

TENDER. See LANDLORD AND TENANT, 5.

TERMINAL. See CARRIERS, 2.

TERMINATION OF CONTRACT. See CONTRACTS, 4.

TITLE.

To land. See CONTRACTS, 3. DEEDS, 1, 2. DRAINS, 1, 3. EMINENT DOMAIN. FRAUDS, STATUTE OF, 1. HOMESTEAD, 1–4. INJUNCTION, 1. MUNICIPAL CORPORATIONS, 7. VENDOR AND PURCHASER, 1, 4. WILLS, 2–6.

To personal property. See CORPORATIONS, 3–12. EVIDENCE, 14. FRAUD, 3. FRAUDULENT CONVEYANCES, 1. GUARANTY, 1. PROCESS, 1. SALES. TAXATION, 10. TELEGRAPHS, 1. UNITED STATES, 2, 3. WITNESSES, 6.

TOBACCO CONTRACTS. See CROPS.

TORTS. See ADMIRALTY, 5. APPEAL, 30. AUTOMOBILES, 2. BANKS, 6, 7. BILLS AND NOTES, 1, 2. BROKERS, 3. CARRIERS, 9. CONTRACTS, 5. CONTRIBUTION, 1, 2. CORPORATIONS, 2–4. FORGERY, 1, 2. FRAUD, 1, 4. GUARANTY, 4. MALICIOUS PROSECUTION, 1–3. MASTER AND SERVANT, 1–3. MUNICIPAL CORPORATIONS, 4, 8. NEGLIGENCE. STREET RAILWAYS, 11. UNITED STATES, 2, 3.

TRADE UNIONS. See INSURANCE, 16.

TRADING STAMPS.

Sale of stamps to merchants: Redemption in cash by merchant or trading-stamp company.

It is not a violation of the provisions of sec. 1747*m*, Stats. 1917 (prohibiting the use of trading stamps but allowing a dealer to issue slips or tickets bearing a stated cash value and redeemable only in cash and only by the person, firm, or corporation issuing them), where stamps complying with the statute in form and contents are sold by a trading stamp company to merchants and are redeemed by the company at its office with money furnished by the merchant or by the merchant himself at his place of business. *Sperry & Hutchinson Co. v. Weigle,* 562

TRANSFER TAX. See TAXATION, 2.

TRANSITORY ACTION. See TRUSTS, 3.

TRAVELED TRACK. See HIGHWAYS, 2.

TREASURY STOCK. See CORPORATIONS, 13.

TRESPASS.

Injunctive relief from continued trespasses on lands.

Where landowners and their children have repeatedly trespassed upon adjoining lands and threaten to continue to do so, the adjoining owner may restrain such trespass. *Behrend v. Buchmann,* 242

TRIAL.

Place of trial. See CRIMINAL LAW, 8.

Opening judgment taken by default. See APPEAL, 12.

Tender of amount due. See LIMITATION OF ACTIONS, 5.

Examination of witnesses. See APPEAL, 22. CRIMINAL LAW, 2, 3. EVIDENCE, 6, 9. WITNESSES, 8.

Instructions to jury: Failure to give requested instructions covered by general charge. See CRIMINAL LAW, 4, 10. DAMAGES, 7.

1. The refusal of the trial court to give plaintiff's requested instruction on a point on which the jury was properly and fully instructed was not error. *Williams v. Duluth St. R. Co.* 261

Order of proof. See CONSPIRACY, 1.

Burden of proof. See NEGLIGENCE, 5.

Same: In personal injury actions.

2. A statement in the charge to the jury that plaintiff was entitled to be compensated for "such pain and suffering, both mental and physical, if any, as it is reasonably certain he will suffer in the future," was not misleading or prejudicially erroneous because the words "as the result of his injury" were not added, where the jury was told, at least twice, that the damages which could be assessed must be such damages as resulted or would result from the injury. *Howard v. Beldenville L. Co.* 129 Wis. 98, explained. *Bassett v. Milwaukee N. R. Co.* 152

3. Plaintiff in a personal injury action may be awarded damages because of diminished capacity for enjoying life or because of "deprivations of the pleasures of life;" and it was not error in such a case to instruct the jury to consider the extent, if any, to which the injury had affected a young man's "ability to engage in pastimes." *Ibid.*

Selection of jury. See CRIMINAL LAW, 8.

Argument to jury. See CRIMINAL LAW, 5.

Deliberations of jury: Duty to consider the written contract of parties. See APPEAL, 13.

4. In an action by a broker for commissions, the jury could not properly ignore in their verdict the terms of a valid contract between the parties. *W. H. Shenners Co. v. Delzer,* 507

Remarks by court. See APPEAL, 18.

Remarks by counsel. See CRIMINAL LAW, 5.

Questions for jury. See APPEAL, 14, 15. AUTOMOBILES, 4, 5. EVIDENCE, 20. INSURANCE, 2. MALICIOUS PROSECUTION, 2. NEGLIGENCE, 6. RAILROADS. WILLS, 1.

Special verdict: Questions to be presented: Different versions of contract. See CRIMINAL LAW, 6. EVIDENCE, 13. HIGHWAYS, 2. NEW TRIAL.

5. Where the parties to an action attempted to prove different forms of contract, a question embodying the contract as claimed by defendant, as well as one embodying the contract claimed by the other side, should have been included in the special verdict. *McNaughton v. McClure,* 288

Same: Form of verdict: Discretion of court: Subdivision of issues.

6. Refusal of the trial court to submit in the special verdict an inquiry as to whether an injury was the result of mere accident for which no one was responsible was not error, as that inquiry was necessarily included in the questions submitting defendant's negligence and as to whether it was the proximate cause of the injury. *Kellner v. Christiansen,* 390

7. The practice of deciding issues in sections by questions covering a part of each issue cannot be approved as good and proper practice, as it tends to subject a trial to the peril of confusing the jury and misleading them into a failure to clearly comprehend the issues and thus to produce mistrials. *Ibid.*

8. In an action for personal injuries involving issues of actionable negligence and proximate cause, the submission in the special verdict of questions as to proximate cause which failed to direct the jury's attention to the concrete issue of fact as to whether the negligent speed of defendant's automobile was the proximate cause of the accident, and splitting up the inquiry as to proximate causation by submitting separate inquiries as to the elements of natural result and reasonable anticipation, necessarily led the jury away from the concrete fact whether defendant should have realized that the excessive speed would naturally and probably injure plaintiff, and was erroneous. *Ibid.*

9. Mere evidentiary facts, or matters in the nature of a cross-examination of the jury, are not proper subjects for special questions; and ordinarily facts in issue which are really single should not be subdivided or be stated in various forms liable to mislead the jury and result in conflicting answers. *Ibid.*

Same: Alternative or disjunctive form.

10. Special questions to the jury in a personal injury action, using the words "flash" and "explosion," were not objectionable as being in the alternative or disjunctive form, where the identity of the cause of injury was not in question and where such words were understood by the jury to mean one and the same phenomenon. *Bell v. Milwaukee E. R. & L. Co.* 408

Same: Question not in special verdict: Instructions.

11. Where the court properly instructed the jury as to the bearing of plaintiff's intoxication on the issues, if they found he was intoxicated, the refusal to submit in the special verdict questions as to whether plaintiff was so intoxicated that his condition proximately produced the injury and whether the injury resulted from mere accident was not error. *Kellner v. Christiansen,* 390

Same: Inconsistent findings: Effect: New trial.

12. Where special interrogatories were submitted to the jury, its findings that the defendant whose automobile struck deceased used ordinary care in operating it in a crowded street and that he failed to exercise ordinary care in looking ahead to see who might be there, were so manifestly inconsistent as to render a new trial necessary. *Ehlers v. Automobile Liability Co.* 494

13. Where special interrogatories were submitted to the jury, it is discretionary with the trial court to determine whether an inquiry as to whether the defendant, whose automobile caused the death of the deceased, was guilty of a want of ordinary care in operating his automobile, should be subdivided into inquiries whether the city ordinances as to lighting and speed were disobeyed and whether rain and other conditions interfered with defendant's operation of his car. *Ibid.*

Correction of special verdict: Verdict to conform to proof.

14. Where there was no conflict in the evidence on the subject of damages from defendant's breach of contract to pay plaintiff a commission, the court properly corrected the amount of the verdict to conform to the proof. *W. H. Shenners Co. v. Delzer,* 507

Reduction of verdict. See DAMAGES, 6, 7.

Trial by court: Findings.

15. Findings of fact should not be a recital of the evidence or a history of the litigation, but should cover only the ultimate issues raised. *Laney v. Ricardo,* 267

New trial. See NEW TRIAL.

Trial de novo. See JUSTICES OF THE PEACE.

TRIAL BY BENEFIT SOCIETIES. See INSURANCE, 15.

TRUSTS.

See BANKS, 6. PROCESS, 1, 2.

Control over trust by court: Directions to trustee.

1. Equity has jurisdiction over all matters relating to trust property, and in the execution and administration of the trust, in all cases of doubt as to their rights and liabilities and what their conduct should be, trustees are entitled to and should seek instruction and direction from the court. *Laughlin v. Griswold,* 50

Appointment of trustee: Usurpation by another claiming to be trustee: Jurisdiction of court.

2. Under a complaint showing that plaintiff as trustee is entitled to the sole or joint possession of trust securities; that he is excluded from physical possession thereof by one of the defendants; that his right to sole possession is challenged by another defendant, who is attempting to act as a co-trustee, claiming to have been appointed, by a third defendant, to be the successor of a deceased co-trustee named in the original deed of trust; and that under said deed of trust plaintiff's legal right to make a required inspection of the trust securities in the absence of his co-trustee, if there is a co-trustee, is uncertain, plaintiff is entitled to an adjudication fixing his rights, duties, and liabilities with reference to the trust property and settling all such controversies in one suit, all persons making claims hostile to his alleged rights in and to the property being made parties. *Laughlin v. Griswold,* 50
3. Where, in such a case, the deed of trust defining the rights of the parties is an executory contract relating to personal property easily movable and of a transient situs, and no personal judgment is asked against any one of the defendants, the action is not one over which any court has exclusive jurisdiction, but may be maintained in a court of the state in which the property is located, even though defendants making hostile claims thereto are residents of another state or of different states. *Ibid.*

UNISSUED STOCK. See CORPORATIONS, 13.

UNITED STATES.

See TAXATION, 1, 5. TELEGRAPHS.

Suits against United States: Courts.

1. The sovereign cannot be sued except with its own consent and in courts of its own choice. *State ex rel. Blaine v. Wisconsin Tel. Co.* 198

Governmental operations: Freedom from interference by state courts.

2. Where the United States by its officers is rightfully in possession of property and is using it in governmental operations, such use is not to be interfered with by injunctions or other writs issued out of state courts in actions brought against such officers. *State ex rel. Blaine v. Wisconsin Tel. Co.* 198

Officers and agents: Liability for torts: Injunction.

3. United States officers or agents may be held personally liable in actions of tort to private persons whose rights of person or property have been wrongfully invaded or injured while acting under the authority of the United States. *State ex rel. Blaine v. Wisconsin Tel. Co.* 198
4. United States officers or agents may be enjoined from carrying out a threat to wrongfully invade or injure rights of property of private persons while acting under the authority of the United States. *Ibid.*

UNITED STATES COURTS. See ADMIRALTY, 1.

UNLAWFUL DETAINER. See APPEAL, 2. LANDLORD AND TENANT, 5.

URBAN TRAFFIC. See PUBLIC UTILITIES, 1.

VACATING JUDGMENTS. See APPEAL, 12.

VENDOR AND PURCHASER.

Requisites of contract: Meeting of minds.

1. Where the purchaser of land wired acceptance of an offer by the vendor's agent of an option for a certain period at a certain price, but sent a written contract providing that the amount paid for the option be deducted from the purchase price and warranting the agent's authority to give the option—terms which the vendor's agent had not agreed to,—there was no contract, the minds of the parties not having met upon essential terms. *Laney v. Ricardo,* 267

Counter offer: Acceptance of option but modifying terms: Authority of agent.

2. The vendor's agent, by notifying another agent having the property listed that he had granted the option, did not assent to new terms, where he had not received the contract stating such terms when notice was given. *Laney v. Ricardo,* 267
3. The vendor's failure to notify the purchaser of the rejection of the contract because it contained terms not agreed to, was no ratification of the contract, where the bank to which it was sent was told of the refusal to sign and of the nonacceptance of the contract. *Ibid.*
4. The vendor's agent did not ratify the option sent by the purchaser for signature but containing terms to which the agent had not agreed, by writing another agent having the land listed that the deal was apparently going through or by writing the purchaser's agent that he was getting the option "altered a little bit," for at such time the vendor's agent, in view of the purchaser's telegram accepting his offer, thought the vendor would consent to eliminating objections so as to make the contract correspond with his offer. *Ibid.*

VENUE. See CRIMINAL LAW, 8.

VERDICT. See TRIAL.

VOLUNTARY ASSOCIATIONS. See INSURANCE, 11, 15.

WAGERING TRANSACTION. See BILLS AND NOTES, 4. GUARANTY, 1.

WAIVER.
Of architect's certificate. See CONTRACTS, 6.
Of damages for nondelivery of goods. See SALES, 13.
Of defenses. See SALES, 7.
Of jurisdiction of court. See JUSTICES OF THE PEACE.
Of objection to delay in bringing action. See CONTRACTS, 10.
Of objection to form of demand. See CORPORATIONS, 10.
Of privilege. See WITNESSES, 8.
WANT OF PROBABLE CAUSE. See MALICIOUS PROSECUTION.
WARRANT. See CRIMINAL LAW, 1.
WARRANTY. See EVIDENCE, 15. SALES, 9.
WATERS. See MUNICIPAL CORPORATIONS, 8.
WIFE. See HUSBAND AND WIFE.

WILLS.

See BILLS AND NOTES, 5. FRAUDS, STATUTE OF, 2.

Contracts to devise or bequeath: Question for jury.

1. In an action for personal services rendered a deceased, the question whether she had agreed to will plaintiff one half of her estate in return for the services sued for, is properly for the jury. *McNaughton v. McClure,* 288

Same: Contract void under statute of frauds: Quantum meruit.

2. One who renders services under an oral contract to devise realty, void under the statute of frauds, must recover on *quantum meruit. Nelson v. Christensen,* 373

Revocation: By subsequent marriage: Conflict of laws: Decree of foreign court: Jurisdiction.

3. Where under the statutes of another state a will is revoked by the subsequent marriage of the testator, a judgment or decree of a court of competent jurisdiction in that state that the will of a person domiciled therein had been so revoked is conclusive and binding upon the courts of this state, even though such will devised real property located in this state and under our statutes marriage alone does not operate to revoke a prior will. *Gailey v. Brown,* 444

4. Where in such a case, upon petition of a devisee, the person having possession of the alleged will was, while in this state, personally served with a citation to produce such will for probate in the county court of a county in this state wherein some of the real property devised was located, and he appeared in such court to show cause why he should not deliver the document, said county court had jurisdiction of his person and of the subject matter. *Ibid.*

Construction: Life estate: Restraints on alienation.

5. A will devising land to a son to have and to hold the same to himself and his heirs forever, with a proviso that he shall not sell, but that the land shall go to his heirs after his decease, gives him a life estate only, with remainder to his heirs. *Meinert v. Roeglin,* 531

6. Such a devise does not offend the rule against perpetuities, since alienation is suspended only during the life of one person in being. *Ibid.*

Right of legatee: Claims against estate: Legacies as payment: Election by legatee.

7. Ordinarily a legatee who has a valid claim may take under the will and also enforce his claim against the estate. *McNaughton v. McClure,* 288

8. The legacies in this case are *held* to have been intended as payment for services rendered, and hence the legatee was not entitled both to the contract price of her services and the legacies. *Ibid.*

9. The evidence is *held* to show that a diamond ring given claimant by deceased was intended as a gift and not in payment for claimant's services. *Ibid.*

WITNESSES.

Cross-examination: Indefiniteness of question: Impeachment. See APPEAL, 19, 22, 24.

1. A question on cross-examination of a defendant whose automobile ran into a ditch, causing the death of one riding with him, "Isn't it a fact that you told V. and several others that you reached over to put up the wind-shield in order to protect the children as far as possible, and you were guiding the car with one hand, and in doing so you ran into the ditch?" was too indefinite for the purpose of impeachment, and an objection thereto was properly sustained. *Klein v. Beeten,* 385

Same: Use of memorandum: Production.

2. The fact that defendant's counsel referred to a memorandum of a witness's statement made after the accident did not require its production, where the witness did not use it to enable him to testify. *Williams v. Duluth St. R. Co.* 261

Testimony of interested persons as to transactions with deceased persons.

3. Testimony of a husband, in a proceeding to contest his wife's will, respecting a payment by him, during coverture, upon a note which he had given to her before their marriage, was admissible when offered in evidence by her administratrix in an action against him on the note; but after the admission of such testimony it was competent for the husband, under sec. 4069, Stats., to explain or contradict it. *Enwright v. Griffith,* 284

4. In an action to recover against the estate of plaintiff's mother for services and disbursements, plaintiff's testimony as to a conversation between her deceased mother and two others, in which plaintiff took part, was incompetent under sec. 4096, Stats. *Nelson v. Christensen,* 373

5. It being manifest that such incompetent testimony referred merely to a statement which deceased in effect had made repeatedly to others, and which manifestly did not affect the verdict for plaintiff, its admission was not prejudicial error. *Ibid.*

Same: Declarations in presence of deceased.

6. Declarations of a wife in her husband's presence to the effect that her father had given her a note and mortgage executed by her husband, were not transactions or communications with a deceased person within the meaning of the statutes, and were properly admitted in evidence in an action on the note and mortgage by the wife against the estate of the husband. *Flanagan's Estate v. Flanagan's Estate,* 537

Same: Party testifying not participating in transaction.

7. A daughter interested in her mother's estate can testify in an action by that estate against her father's estate to conversations between her mother and father in which she did not participate. *Flanagan's Estate v. Flanagan's Estate,* 537

Privileged communications: Physician and patient: Waiver by patient. See INSURANCE, 3.

8. The privilege granted by sec. 4075, Stats.—providing that no physician shall be *permitted* to disclose information acquired in attending a patient and which was necessary to enable him to prescribe,—is the privilege of the patient, not of the physician. The refusal of a physician, therefore, to disclose such information upon his adverse examination under sec. 4096, Stats., in an action against him for malpractice, after the patient had expressly waived said privilege and he had been ordered by the court to answer, was a contempt of court. *Markham v. Hipke,* 37

9. The privilege granted by sec. 4075, Stats., to physicians and surgeons is a privilege in favor of the patient, and a patient may waive it and have the physician testify in a personal injury action. *Angerstein v. Milwaukee M. Co.* 502

WORDS AND PHRASES.

Ability to engage in pastimes, in instruction. See TRIAL, 3.
Action, in statute. See JUSTICES OF THE PEACE, 1.
Action be dismissed, in order. See APPEAL, 2.
Adultery. See ADULTERY, 1, 2.
Altered, in letter. See VENDOR AND PURCHASER, 4.
As are present, in instruction. See CRIMINAL LAW, 4.
As fast as general construction will permit, in contract. See CONTRACTS, 7.
Common carrier. See CARRIERS, 1.
Control, in statute. See TELEGRAPHS, 1.
Damages, in statute. See JUSTICES OF THE PEACE, 1.
Damages to two or more persons, in bond. See DEATH, 2.
Emergency, in statute. See PUBLIC UTILITIES, 5.
Employment, in statute. See WORKMEN'S COMPENSATION, 10.
Engaged in military service, in insurance policy. See INSURANCE, 4.
Exclusive bidder. See CONSTITUTIONAL LAW, 3.
Explosion, in instruction. See TRIAL, 10.
Flash, in instruction. See TRIAL, 10.
Fornication. See FORNICATION.
General rate order, in statute. See PUBLIC UTILITIES, 5.

WORDS AND PHRASES—con.
Gifts, in statute. See TAXATION, 7.
If on its road, in contract. See CARRIERS, 8.
In good standing, in by-laws. See INSURANCE, 16.
In the hands of a committee, in by-laws. See INSURANCE, 12.
In the service of a common carrier, in statute. See AUTOMOBILES, 1.
Liability. See WORKMEN'S COMPENSATION.
Maritime service. See ADMIRALTY, 2.
Material part of estate, in statute. See TAXATION, 7.
Military service, in insurance policy. See INSURANCE, 4.
On trial in a court of justice, in statute. See BANKS, 5.
Operate, in statute. See TELEGRAPHS, 1.
Operating steam railway as common carrier. See CARRIERS, 2.
Operations. See TELEGRAPHS, 1.
Original jurisdiction. See INSURANCE, 14.
Our peel this year, in contract. See SALES, 2.
Passengers. See STREET RAILWAYS, 10, 11.
Permitted, in statute. See WITNESSES, 8.
Plants and systems, in contract. See SALES, 9.
Police power. See CONSTITUTIONAL LAW, 1.
Possession, in statute. See TELEGRAPHS, 1.
Scope of employment. See STREET RAILWAYS, 11.
Services growing out of and incidental to his employment, in statute. See WORKMEN'S COMPENSATION, 11.
Street railway. See STREET RAILWAYS, 1.
Subject matter. See JUSTICES OF THE PEACE, 3.
Transaction or communication, in statute. See WITNESSES, 6.
Transfer in contemplation of death. See TAXATION, 7.
Trial, in statute. See BANKS, 4.
Void. See MARRIAGE.
Within any municipality. See STREET RAILWAYS, 2.
Work done or materials furnished, in contract. See CONTRACTS, 9.

WORKMEN'S COMPENSATION.

See ADMIRALTY, 3.

Character and attributes: Contract of employment: Injuries in another state: Liability for injury.

1. Before the enactment of the workmen's compensation act the liability of an employer for injury to an employee caused by the employer's negligence was that prescribed by the common law as modified by statute. It was a liability *ex delicto* and the principles governing tort actions were applied. Wherever the action was brought the rights and liabilities of the parties were determined by the law of the place where the injury occurred. *Anderson v. Miller Scrap Iron Co.* 106
2. The liability of the employer under the workmen's compensation act is, however, of an entirely different nature and based upon a wholly different economic theory. Not being based upon, or limited to injuries sustained by reason of, any wrongful conduct or negligent act of the employer, the principles govern-

ing tort actions are not applicable. Language used *arguendo* in *Borgnis v. Falk Co.* 147 Wis. 327, limited and explained. *Ibid.*

3. Nothing in the language of the workmen's compensation act limits its application, either by express terms or by necessary implication, to injuries sustained within this state. *Ibid.*

4. The liability of the employer under the workmen's compensation act is not contractual in the sense that it should be considered as a covenant or part of the contract of employment, but is purely statutory. It grows out of and is incidental to the relationship created by the contract, but it is the statute, not the contract, which prescribes the conditions and the rate of compensation, and these cannot be changed by agreement between the parties, but may be altered by amendment of the statute without impairing the obligation of existing contracts. The fact that our statute is not compulsory and that an employer may elect to come under it or not and may withdraw does not materially affect this question. *Ibid.*

5. The liability of the employer under the workmen's compensation act being statutory, the act enters into and becomes a part of every contract of employment made within this state, not as a covenant, but to the extent that the law of the land is a part of every contract; and the rights and liabilities of the parties to such a contract of employment must be determined with reference to the act. *Ibid.*

6. Where a contract of employment is made in this state and both employer and employee are within the terms of the workmen's compensation act, the liability of the employer for an injury to the employee is that prescribed by the act and he has no other or different liability. *Ibid.*

7. Where a contract of employment was made in Wisconsin and both parties thereto were residents of this state and were subject to our workmen's compensation act, their rights and liabilities in case of injury to the employee must be determined in the courts of this state in accordance with the provisions of said act, whether the injury occurred within or without the state. *Ibid.*

[8. Whether in such a case, if the injury occurred in another state in which the employee was at the time prosecuting the employer's business, the courts of that state should enforce our compensation law, or whether if the facts were reversed the courts of this state should enforce a like law of a sister state, not considered.] *Ibid.*

Railroad companies: Acceptance by employer: Jurisdiction of industrial commission.

9. Under sub. (3), sec. 2394—8, Stats. 1915, where an employee who was injured while switching cars for a railroad company operating a steam railroad as a common carrier was not subject to the compensation act because he had not accepted its provisions, the industrial commission had no jurisdiction of the subject matter of an award of compensation for the in-

jury, and the employer could not, even by stipulation, confer jurisdiction or waive the lack of it. *Waldum v. Lake Superior T. & T. R. Co.* 137

Same: Employee: Notice of acceptance.

10. Although an employee of a railroad company operating a steam railroad as a common carrier became subject to the compensation act soon after its enactment (ch. 50, Laws 1911), by reason of the company's election to come under the act, yet where his subsequent employment had not been continuous he was not subject to the act after the enactment of sub. (3), sec. 2394—8, by ch. 599, Laws 1913, unless he filed the notice of acceptance therein provided for. [Whether he would have continued to be subject to the act if his employment had been continuous, not decided.] *Waldum v. Lake Superior T. & T. R. Co.* 137

Conditions of liability: "Service growing out of and incidental to his employment."

11. Where a salesman, required by his duties to go from place to place in a city, slipped and injured his leg on a public street while so engaged, he is "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats.; and the accident cannot be considered the result of an ordinary street risk. *Schroeder & Daly Co. v. Industrial Comm.* 567